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ABSTRACT

This document presents witness testimonies and prepared statements from the Congressional hearing called to examine the circumstances surrounding the funding and subsequent termination of the Office of Juvenile Justice and Delinquency Prevention's (OJJDP) grant for the National Partnership to Prevent Drug and Alcohol Abuse. In his opening statement, Representative Dale Kildee notes that $1 million was spent on the program during its first 11 months with little or no impact on services available for children, and emphasizes the importance of determining the factors that contributed to the demise of the program. A brief statement by Representative Thomas Tauke is also given. Witnesses providing testimony include: (1) Verne Speirs, acting administrator, OJJDP, United States Department of Justice; (2) Samuel Keker, former acting president, National Partnership to Prevent Drug and Alcohol Abuse; (3) William Butynski, executive director, National Association of State Alcohol and Drug Abuse Directors; and (4) Ken Eaton, trustee; National Partnership to Prevent Drug and Alcohol Abuse. Included with Speirs' prepared statement in a chronology of major events concerning OJJDP's monitoring of the partnership and actions not to continue funding. Witnesses explain their role in the National Partnership, suggest reasons for its failure, and make recommendations to the OJJDP for determining grants to future projects. Letters and relevant materials are appended. (NB)

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NATIONAL PARTNERSHIP TO PREVENT DRUG AND ALCOHOL ABUSE

HEARING

BEFORE THE

SUBCOMMITTEE ON HUMAN RESOURCES

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, DC, SEPTEMBER 19, 1986

Serial No. 99-146

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NATIONAL PARTNERSHIP TO PREVENT DRUG AND ALCOHOL ABUSE

FRIDAY, SEPTEMBER 19, 1986

House of Representatives,
Subcommittee on Human Resources,
Committee on Education and Labor,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m., in room 2261, Rayburn House Office Building, Hon. Dale E. Kildee (chairman of the subcommittee) presiding. Members present: Representatives Kildee, Tauke, and Petri.

Staff present: Susan Wilhelm, subcommittee staff director; S. Jefferson McFarland, legislative counsel; Margaret Kajeckas, clerk; Carol Lamb, minority legislative associate; and Dan Yeager, minority counsel.

Mr. **Kildee**. The Subcommittee on Human Resources convenes this morning to discuss the circumstances surrounding funding and subsequent termination of the Office of Juvenile Justice and Delinquency Prevention's grant for the National Partnership for Alcohol and Drug Abuse.

The concept for the national partnership grew out of a number of meetings sponsored by the Office of Juvenile Justice and Delinquency Prevention in late 1984. The partnership received a grant from OJJDP effective August 1, 1985, with the ambitious mandate of bringing together people and resources from a number of disciplines to address the serious problem of alcohol and drug abuse in our Nation.

Eleven months later, after the expenditure of close to $1 million, OJJDP announced the suspension and then termination of the grant. It appeared that few of the grant's objectives had been met in spite of the expenditures of large sums of money.

Juvenile justice funds are extremely limited. That $1 million was spent with apparently little or no impact on services available for the children the act was designed to assist is of great concern to the committee.

It is important to determine the factors contributing to the demise of a program that was begun with such large expectations. It is also important to understand what must be done differently should such an undertaking be attempted again.

The Juvenile Justice and Delinquency Prevention Act was established out of a great concern for the children of our Nation. This hearing is being held with the intent of ensuring that juvenile justice funds are expended as effectively as possible to benefit children. We are pleased to have with us several witnesses who have agreed to help us in this learning process.

In this program, we must see that children are served and we also as people in Government must see that in so doing that we be careful custodians of the taxpayers' dollars.

It is for that reason that we come together this morning to see why this happened and what can be done to prevent similar things occurring in the future.

I call upon now the ranking minority or Republican member of the committee, Mr. Tauke of Iowa.

Mr. **TAUKE**. Thank you, Mr. Chairman.

I would like to suggest that minority wouldn't long be applicable, but I am not certain that that is a likely scenario.

I do want to note, Mr. Chairman, that this is probably the last hearing that this subcommittee will hold during the current Congress, and I have enjoyed very much the opportunity to serve on this subcommittee and to work with you and your staff.

It has been a great pleasure for us. We very much enjoyed all of the courtesies that you have extended, and I hope that in the next Congress we will both be here again and will be able to work together on these issues that are of such concern.

Mr. **KILDEE**. God and the voters will determine that.

Mr. **TAUKE**. And the causes that we both share.

Mr. Chairman, I also want to express appreciation this morning to Mr. Speirs and to the Office of Juvenile Justice and Delinquency Prevention for the cooperation that they have extended to this subcommittee in the investigation of this particular issue and on other matters.

We very much appreciate the good working relationship that we have had with you and your office, Mr. Speirs. I recognize that this hearing is brought about by an unfortunate set of circumstances that led to the termination of the grant with the National Partnership to Prevent Alcohol and Drug Abuse. I hope that while this grant has been terminated that we are not in any way diminishing our desire to achieve the goals and objectives of the grant, essentially to prevent alcohol and drug abuse among youth.

Although the issue has been hyped a little bit and probably subjected to a little bit of political grandstanding over the last couple of months, that should in no way diminish the intensity of our efforts to prevent alcohol and drug abuse among youth, I hope that the problems which have arisen relating to this grant do not diminish our desire to meet that objective.

We should learn from the problems associated with this grant and do all that we can to guard against similar situations developing in the future.

If that requires additional oversight on the part of this subcommittee, we should recognize that. If it requires changes in legislation, obviously we will have to deal with that. It may just mean that there needs to be some change at the administrative level.

In any event, I look forward to the testimony today. I hope it helps us get a better handle on this issue and helps us make certain that the program works even better on behalf of the young people of our Nation in the years ahead.

Thank you.

Mr. **Kildee**. Thank you, Tom.

Our first witness is Verne L. Speirs, the Acting Administrator of the Office of Juvenile Justice and Delinquency Prevention. We look forward to working with you on this issue and all issues affecting children as they are administered by your agency.

Thank you for your appearance. If you wish to have people accompany you, that is all right with us.

STATEMENT OF VERNE L. SPEIRS, ACTING ADMINISTRATOR, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DEPARTMENT OF JUSTICE

Mr. **Speirs**. Thank you, Mr. Chairman and thank you, Mr. Tauke. Thank you for inviting me to testify before the subcommittee today concerning the Office of Juvenile Justice and Delinquency Prevention's grant to the National Partnership to Prevent Alcohol and Drug Abuse among youth.

As you know, the Partnership was launched in October 1985 with a $1 million OJJDP grant amid high expectations that it would foster increased public and private sector involvement in combating the problem of substance abuse by our Nation's youth.

Unfortunately, these expectations were never realized. Therefore, soon after I became Acting OJJDP Administrator, I suspended further funding for the partnership, and later, based on the findings of a subsequent program review, decided to terminate the program activities and not fund the program past July 1, 1986, the end of the grant period.

I have attached to my testimony a chronology of major events concerning OJJDP's monitoring of the partnership and our actions not to continue funding, so I will not take up the subcommittee's time this morning by detailing these events.

I would like to say before responding to questions that you may have, that the final decision not to continue funding the partnership should not be construed to be a reflection on the level of commitment of the partnership staff. I understand the hardship this decision caused partnership employees. It was unfortunate that it was necessary to take this action.

We believe the employees conducted themselves in a professional manner throughout the life of the program, particularly during the difficult days of program closeout.

For a variety of reasons, however, the program's potential was never achieved.

Thank you, Mr. Chairman. I will be pleased to respond to any questions that you may have.

Mr. **Kildee**. Thank you very much for your testimony, Verne.

Let me start with these questions. Federal law prohibits a Federal agency from establishing a nonprofit corporation without specific statutory authorization.

In assisting with the national partnership organizing activities, did OJJDP stay within the bounds of this law, in your opinion?

Mr. **Speirs**. The answer that I have is yes, that they stayed within the bounds as based upon the review of the advice given by the general counsel.

Mr. **Kildee**. I guess we have to ask, because we are trying to work together to see how we can continue to serve these young people. We must see whether the spirit of the law was kept in some of the apparent assistance which the national partnership received in those early days of organization.

Do you feel that the spirit of the law was kept?

Mr. **Speirs**. I would have to address you this way from my knowledge, or I should say my lack of knowledge, of what went on at that time, Mr. Kildee. I don't believe I could pass a value judgment on that because I was not there. I did not take any part in that.

Mr. **Kildee**. I guess what we will try to ferret out in this hearing and subsequent investigation, too, is to see whether there was such a close relationship between the national partnership and the OJJDP that it could be accused of being cozy—I use that word; that is a rather subjective word—whether the relationship was too close.

Let me ask you this in conjunction with that: Did the OJJDP financially support the preparation of the national partnership's grant application?

Mr. **Speirs**. The answer is no. I think you are referring to the situation of the writing of the actual grant application, and money to pay for that was from a private source paid to a consultant, who wrote that application.

Mr. **Kildee**. What was that private source?

Mr. **Speirs**. I believe it was from a brewery company. I can get the exact name or trace that back for you if you would like.

[The information is included in the appendix.]

Mr. **Kildee**. They were at that time accepting then private contributions?

Mr. **Speirs**. Well, to say accepting, I am not sure what that delineates. I know that that money was available or at least was made available to pay for that particular activity, but it was not OJJDP's funds that went to pay for the service of writing the application.

Mr. **Kildee**. In reviewing the national partnership's application for assistance, did the Office use peer reviewers with expertise in the alcohol and drug abuse prevention field, did they clearly find that the application had outstanding merit, and were any of the application review criteria changed? I ask this because when you do award something on a noncompetitive basis, there are certain criteria that must be followed, and one is that it be reviewed by a peer review panel.

Can you tell us whether that took place in accordance with the law?

Mr. **Speirs**. From what I understand there was a peer review process. There was an initial panel. Two individuals on that panel either removed themselves or were disqualified because of an apparent conflict of interest, that conflict being that they were involved in the early stages of the meetings or the early formation of the concept of the Partnership. So they disqualified themselves or were asked to leave.

Two new individuals were put in and there was a peer review that was done by that panel.

Mr. **Kildee**. Who asked them to leave, the first two?

Mr. **Speirs**. I think the program manager who was involved in handling the process or one of the staff members that was handling the process. I know that Mr. Frank Porpotage asked, I believe, one of the peer reviewers to remove herself, and I think one of the second peer review panel members removed themselves.

Mr. **Kildee**. Who was the program manager?

Mr. **Speirs**. It was the staff person working to get the peer review process done, Mr. Porpotage.

Mr. **Kildee**. To whom did he report?

Mr. **Speirs**. At that time, his chain of command was through Mr. Donahue, but he was reporting directly to the Administrator.

Mr. **Kildee**. Thank you.

Mr. Tauke.

Mr. **Tauke**. Thank you very much, Mr. Chairman.

Who would you say initiated this effort to establish the national partnership?

Mr. **Speirs**. Who initiated the effort?

Mr. **Tauke**. Yes.

Mr. **Speirs**. From my understanding, the initiation or the force behind it was the former Deputy Administrator of the office.

Mr. **Tauke**. Do you have any feeling as to why there was the belief that it was necessary to establish a new organization?

Mr. **Speirs**. My impression is this: that the concept where you are taking such diverse groups, the business community, concerned citizens, drug and alcohol people, and trying to bring them together on such a large-scale basis and trying to establish a national voice to combat the alcohol and drug abuse problem, it was the thought that there was a need to have a unique entity that could handle that level of program direction and policy formulation.

Mr. **Tauke**. So the idea, from your perspective, originated within OJJDP? They didn't think there was another appropriate group to take on this task, so it served as a catalyst in order to establish what would hopefully be a national group that could tackle this challenge?

Mr. **Speirs**. I think that is a fair characterization.

Mr. **Tauke**. You indicated that the board was made up of four groups. I am not sure I can identify the four groups.

Mr. **Speirs**. If you are talking about the four general areas that the groups were drawn from——

Mr. **Tauke**. Yes.

Mr. **Speirs**. One was the business community, you had a community from the media, you had private sector business and then you had the professionals involved in drug and alcohol abuse, those people involved in the actual business of treatment or prevention.

Mr. **Tauke**. The business community, the media——

Mr. **Speirs**. Private citizens——

Mr. **Tauke**. Private citizens——

Mr. **Speirs**. And professionals in the field.

Mr. **Tauke**. What kind of legal responsibility did the board have for the operation of the national partnership?

Mr. **Speirs**. I cannot answer that. I do not know.

Mr. **Tauke**. I presume they adopted some kind of charter or bylaws?

Mr. **Speirs**. The partnership was a duly incorporated entity and had a status all of its own. From a management perspective or from an organizational perspective, there was a broad-based membership group or this broad-based input. Then you had a subsequent step where the membership would take input or give input to a coordinating committee and they would establish policy and gain implementation consensus. Then you went from there to a board of trustees that took direction from this coordinating committee and from there it filtered down into the organization.

Mr. **Tauke**. It seems to me part of our effort here should be trying to determine who was responsible for this. I serve on a couple of boards. I assume when I serve on those boards that I take some responsibility for the organization. In this case, it would appear as if—if I perceive the facts correctly—it would appear as if nobody was taking responsibility for the operation of this organization, and it prompts me to ask what happened to the board of trustees? Have they simply washed their hands of any responsibility for the operation of the organization and the expenditure of funds?

Mr. **Speirs**. I don't know. No one has come to me to ask about the project, to mention salvaging the project or taking the concept in any other direction.

Mr. **Tauke**. Suppose it were private funds and that I and Mr. Kildee and you, have maybe a lot of money and decided to transfer some to this organization to carry out a task. I would assume that if this kind of thing had occurred that maybe the board of trustees hadn't done what it was supposed to do, and there might be at least a review of the legal responsibility of the board of trustees for the actions of the partnership.

Has your office——

Mr. **Speirs**. We have not.

Mr. **Kildee**. Would you yield?

Mr. **Tauke**. Yes.

Mr. **Kildee**. Is there any possibility that you are aware of or any attempt that you are aware of trying to recover any of the money that was——

Mr. **Tauke**. That was the next question.

Mr. **Speirs**. What we have done was based on our financial review. And to answer your question shortly, no, we have not taken steps or made that as an option. What we have done, since I came on board, was to go in and look at the books. At that time $764,000 approximately was expended or obligated and that was gone.

At the rate of spending that continued within the final 2 months, you virtually had all the money expended. As far as looking to the expenditures or looking to what the money had gone for, within certain exceptions, the expenditures were allowable costs per the terms and conditions of the grant and other OMB circulars and regulations. So we could not go back and say—as far as the way the money was expended for the program—we could not reach in and say this was wrong. There where some exceptions that we dealt with.

Mr. **Tauke**. About $80,000 in exceptions?

Mr. **Speirs**. Approximately $81,000 and we have looked at those and negotiated them out and it is down to quite an amount less than that.

Mr. **Tauke**. What do you mean negotiated out?

Mr. **Speirs**. At first blush when we sent the comtroller's staff in to look at the expenditures, there were some areas that we questioned on cost and when they came back with explanations or when the Partnership took whatever remedial action was necessary, the bottom line was less than $81,000.

Mr. **Tauke**. So if the money is misspent outside of the context of the grant, let's say, what happens then? Is there any way to recover that money?

Mr. **Speirs**. When you are dealing with a grant either it is viable and has a budget. If there is a misexpenditure, you disallow that cost, don't let them draw down or recover the money. In this case, the balance within the last week, there is $34,000 or $35,000 left out of the original $1 million.

Mr. **Tauke**. You found this situation when you came aboard. What was going on before you came aboard?

Mr. **Speirs**. I cannot answer that because I don't know. I wasn't there.

Mr. **Tauke**. Did it just come to you out of the blue, or when you came aboard did somebody say, "Hey, we have been looking at this and there is a problem here?"

Mr. **Speirs**. Basically, I was asked to take the office. One of the problems that I was told that I was going to have to step in and handle was the partnership, from several voices, such as the Comptroller's Office, and general counsel. It was indicated that I needed to look at this and very quickly get into a program review and look at the project.

At that time the administrator was gone and I stepped in.

Mr. **Tauke**. Is this considered a contract?

Mr. **Speirs**. This is a grant. There is a formal grant document signed with the Government.

Mr. **Tauke**. And somebody signed it on behalf of the national partnership?

Mr. **Speirs**. Yes.

Mr. **Tauke**. Who did?

Mr. **Speirs**. Mr. Rex Thompkins.

Mr. **Tauke**. What was his role?

Mr. **Speirs**. He was president of the partnership.

Mr. **Tauke**. I presume that he on behalf of the partnership takes on certain obligations, contractual obligations?

Mr. **Speirs**. The obligations spelled forth in the grant plus any special conditions, yes.

Mr. **Tauke**. I believe in other areas of Government we would be beating up on people to, first of all, pinpoint responsibility, and second, to try to recover the money. I understand the problem that you have with the recovering of the money. I guess I still go back to the board of trustees. It seems to me that the board of trustees did not carry out their fiduciary responsibilities to the organization and therefore have some responsibility for the failure of the organization to meet its contractual obligations. I am not sure this is a fair question, you can tell me if it isn't, but why has no consideration been given to checking that out? Is that just not the policy of Government?

Mr. **Speirs**. I can't say it is not the policy of OJJDP. I don't think the track we were following was back to the board of trustees. We were looking to the officers of the corporation or to the entity that received the grant. And that was the partnership, a legally constituted not-for-profit organization that was the recipient of the grant.

To make that connection back to the board of trustees, at this point would not be appropriate, in my judgment.

Mr. **Tauke**. Let me just observe, Mr. Chairman, I am not sure that I will accomplish anything by continuing to hammer this to death, but we do set a fairly bad precedent if we suggest that there is kind of an unknown entity out there that does have responsibility, but the people who run it don't have the responsibility.

In this case, the people who run the entity, it seems to me, were those members of the board of trustees. It appears as if there was a terrible leadership problem and management problem within the national partnership. If there is a leadership and management problem, that is the responsibility of the board.

Now, the board, it occurs to me understood that they were taking money from the Government in order to carry out certain responsibilities, and if they are unable to fulfill those responsibilities, they have two choices: They ought to either, change the management so they can; or, B, stop the expenditure of the money and send it back to the Government. I am not sure that in this instance what all of the legal possibilities might be, but I think that somewhere along the line we should send signals to those who have responsibility, whether they be board members of a nonprofit or a profit organization that they do have some obligation when they receive Federal funds to see that those funds are expended appropriately.

So I guess as you carry on with the activities of the OJJDP, that I hope that that is reviewed. I suppose I hope, too, that you take a look at what the potential responsibility of the board in this case might be. Somebody should rattle their cage a little bit is the bottom line.

Thank you, Mr. Chairman.

Mr. **Kildee**. Thank you.

In going over the peer review panel worksheets, we notice that one of the peer reviewers in evaluating this group on organizational capability, which in retrospect seems to have been somewhat deficient, before the grant was given, while doing the peer review, out of 15 points, gave 5 points.

Now, that is—I am a teacher. That would be flunking. Is that considered flunking in your agency?

Mr. **Speirs**. I can't tell you—I will say that that was a very low score on that capability. I don't know what the scale was that they were using, but it was obviously a very low score.

Mr. **Kildee**. Total points were 15; they got 5. That would be about one-third. In my Latin classes I would have advised the student to take another course. I recognize, Verne, that you came in after the fact and you were not involved—we may want to be calling other witnesses later on to find out what was happening at the time this was given.

I want to go back to what I consider really a moral obligation that goes beyond a legal obligation; that is, to be really careful custodians of taxpayer dollars. I think it is a real moral obligation and I think that those that we bring into Government should have that sense of morality, which goes beyond the sense of legality.

This certainly is in no way direct or indirect criticism of you, because I am aware of the chronology here.

While I have the chance, I would like to say we in Government have an obligation to morally spend the taxpayers' dollars. I think that is a very important thing to do.

I last year returned $47,000 to the Treasury which I did not need to spend. At all times, but particularly in these times of very, very high deficits we should try to have that moral attitude, and again that is not directed at you because I know very well the chronology of these events here.

How extensively did the OJJDP use ASPEN Systems to perform tasks and incur costs associated with the national partnership?

Mr. SPEIRS. ASPEN Systems, Mr. Kildee, was involved earlier in the formative and organizational activities of the partnership, providing technical assistance dating back into May 1984, and up until the time of the grant award, possibly some activities afterwards.

It was responsible for organization of meetings, putting on the meetings, the four constituency groups that we talked about, it worked with those groups and worked with the organization of the meeting in Williamsburg, which seems to be the hallmark of the formation of the partnership and it worked until after the actual awarding of the grant.

Most of its work was from a technical assistance aspect.

Mr. KILDEE. Would you provide us a record of the details of all ASPEN Systems tasks and costs relating to the national partnership, beginning with the January 1985 meeting in Williamsburg?

Let me ask you this question, too. The award to the national partnership was made October 1. It was backdated to August 1 and was terminated on July 1 of the following year.

Let me ask, first, why was it backdated and is that commonly done in awarding grants like this?

Mr. SPEIRS. In this particular case, the reason for backdating, apparently was that there were some preagreed-upon costs. Basically, there were four consultants who eventually became senior vice presidents in the organizational structure and there were some costs related to those individuals. The preagreement was that they would go back to August 1 to cover some of those costs.

I can't say it is common; I have seen it done, where there are allowable expenditures that are directly related to the project. That can be covered if the backdating takes place.

Mr. KILDEE. I would say that whenever one does predate something that one should be well prepared to give compelling reasons why such predating takes place, because that is, I would say, not considered standard operating procedure in dealing again with the taxpayers' dollars.

In conjunction with a question Mr. Tauke asked earlier, of the $1 million, he asked what was it spent for, and it was for, you replied, various types of expenses.

Do you have any breakdown as to the type of expenses? Was it for travel? For meals? For entertainment? Do you have any breakdown available for the committee as to how those expenses occurred?

Mr. SPEIRS. I can give you a breakdown as of the end of June. We are still calculating or the bookkeepers are calculating to the end of the grant period because there are minor things that need to be cleaned up. As of the end of June, personnel, right at $285,000; fringe benefits, $47,000; travel, $40,000; equipment, $13,000; supplies, $22,000; consulting and contractual fees, almost $190,000; other expenses—and I am not sure what all that includes—about $141,000.

Mr. **Kildee**. Other expenses, $141,000?

Mr. **Speirs**. Yes, and taxes, interest, and insurance, et cetera, $10,000 plus, with a total figure of right at almost $750,000.

Mr. **Kildee**. The other expenses seems to be the bigger item?

Mr. **Speirs**. Well, outside of your personnel and your consultant, because your personnel is $284,000 and your consultant is $188,000 for a total of $473,000.

Mr. **Kildee**. Mr. Tauke.

Mr. **Tauke**. In testimony Mr. Keker is offering on the next panel, he suggests that part of the problem with this operation was that the efforts to recruit key, full-time staff came to a standstill presumably at the request of the prospective chairman that was coming aboard any day.

Who was selecting the chairman of the board of this operation?

Mr. **Speirs**. I believe that the board of trustees had the final vote on who was going to be chairman—the decision had to go through the board of trustees.

Mr. **Tauke**. But who was really out recruiting the chairman?

Mr. **Speirs**. The only person I knew of involved with that was a gentleman by the name of Mr. Baldwin, who was interim chairman of the board of trustees. That is the only person I talked to who talked about a full-time chairman.

Mr. **Tauke**. As I read some of the other testimony, one gets the impression that the board was brought together with the assumption that maybe this was an honorary-type operation, that the OJJDP was going to take over the responsibility of setting this up and ensuring that there was management for the national partnership.

Is there any truth to that perspective?

Mr. **Speirs**. I can't say that OJJDP was going to step in and manage the program. I can say that was not an appropriate function and I don't see that in documents that I have.

Mr. **Tauke**. There was apparently some fairly famous and well-known American who was being recruited for this position of prospective chairman. I get the impression that that person was being recruited by the administration, not by the board of trustees of this organization.

Mr. **Speirs**. The only time this individual was mentioned was when I came on in June. My question was where are they and the indication was that this individual had made the decision not to be associated with the partnership.

Mr. **Tauke**. What is the OJJDP doing giving a grant to an organization that has no chairman of the board and no president?

Mr. **Speirs**. I think as far as the structure, OJJDP thought it was going to be in place. They had a president of the partnership. They had the formal organization as put together by the partnership.

When you get into the board of trustees or the coordinating committee, I don't know that that was focused on. I think the focus was on the partnership as an entity and whether they could receive the grant moneys. The action was based on that act.

Mr. **Tauke**. Mr. Keker says that the instructions to delay the recruitment of full-time staff, it was his impression, were initiated or at a minimum concurred in by the OJJDP. Is that true?

Mr. **Speirs**. There was a point in time when the previous administrator did instruct the organization not to go ahead and recruit or move forward and the basis for that instruction was an analysis of the moneys expended at that time.

Almost one-half of the moneys were expended. There was no implementation or operation plan. The office was, I would say, this is an understatement, was extremely concerned about the lack of progress, the lack of implementation, the lack of attention to the detail of what had to be accomplished in the grant and did inform them to focus their energies and efforts in putting together an implementation plan. This instruction was given so they could move from the concept phase into making a functional organization. That was in February, and they were directed to take on the task of showing how they could move the project forward.

Mr. **Tauke**. I recognize you weren't involved at the time, but what went wrong? I mean, what happened? Where do we put our finger?

Mr. **Speirs**. From my involvement, I think you had a concept, you had an idea that had merit, but where it breaks, in my estimation, from looking at the material, it was taking the concept and what was written and turning it into an organization that could move forward. It broke. It tore. That transition never happened.

Mr. **Tauke**. And what was the reason? What was the reason that the concept didn't turn into reality? Because no one assumed responsibility, that is why.

I don't know who was supposed to assume responsibility, whether it was the granting agency or the recipient of the grant, but it seems to me that in part the granting agency had responsibility to ensure that there was someone responsible on the other end.

Mr. **Speirs**. There are several areas. The leadership or lack of effective leadership or control of the leadership. There was a vacancy in the presidency. There was a style of management, I think, where management, as I read the documents and go back, starting in the months of January and February, lacked a sense of direction. A lack of solid, forceful authority within the organization, directing the daily operation.

I think the staff picked that up, that lack of direction, and our staff sensed it from their visits. The record is replete with staff visits starting, say, in January or February. There were a number of visits, the Comptroller's Office going in, project managers going in and looking at what was happening.

There is an issue of taking an organization and looking at the grant document and saying, "Does the organization understand what they have to do to take the money, take the concept and then move forward?"

In some of the material I have received, an understanding of what was required by the grant was not there, I think, this lack was a very, very big issue.

The problem was in taking the implementation plan, as in any business, taking a strategy to move to where you want to go to accomplish your goals and objectives. That strategy was not in place until the office stopped the effort, and directed them to write the implementation strategy and put that in line.

A special condition in the grant indicated that that implementation plan had to be approved by January 10, 1986. It was not submitted to the office until, I think, March 14 and finally passed by their board of trustees sometime in April.

So you are looking from January to April, actually before that, that you had no implementation plan to take the concept and it into functional reality.

Mr. **Tauke**. What do we learn from this? How do we prevent this from happening in the future? Do we need new guidelines?

Mr. **Speirs**. I have to tell you how I would approach it, if it were not to happen again.

One, I would maybe look at a competitive process in selecting a grantee. Two, I think I would look to an organization that is up and on line and has some kind of track record.

I would look for subject matter experts not only in the field that I was trying to impact, but also people in grants management and the area of handling the money or have some concept of it.

I think I would have maybe put my managers on sooner to deal with the grantee. I don't think I would use a grant, but I would work with a cooperative agreement which would give me as much say and as much control in that program as the recipient of the money and I would manage the daylights out of it.

Mr. **Tauke**. Thank you, Mr. Chairman.

Mr. **Kildee**. Getting again back to the predating of the award to August 1, it was awarded October 10. It would seem that since the grant was predated that there must have been assurances that the grant was coming.

Do you know who gave the assurances to whom?

Mr. **Speirs**. I do not.

Mr **Kildee**. Because they had incurred some expenses and then those expenses were covered by the grant which as made in October. It would seem that they did not have a printing press to make money, that they must have had some assurances that the money was going to come and it was OK then to spend this money and that the expenditure would be covered then by the grant when it came.

It would seem that someone had to give assurances to someone else. What I would like to find out as chairman of the committee and Mr. Tauke, I am sure as the ranking minority member, is who gave the assurances to whom?

Mr. **Speirs**. I do not know who was in conversation or what communication channel was used, nor what all the expenses were. I just don't have that knowledge.

Mr. **Tauke**. Can you get it for us?

Mr. **Speirs**. I will certainly try.

Mr. **Kildee**. I think that is a very essential thing. We are trying to do two things here. We are trying to see what went wrong, and we are going to be hard pressed to recover any of this money, I am sure. We also want to see what we can do in our oversight responsibility as members of this committee, to see that that does not happen again in the future. Mr. Tauke and I have to go to the appropriations committee regularly and urge them to spend money for good programs to serve the youth of this Nation. It makes our job difficult when they can point out, as they must and as they should, that here was a million dollars frittered away, money that was sent to us by the taxpayers of this country, with the expectation that we would at least try to spend that money prudently and carefully.

And really I can't see where it touched one young person in this country, not one young person.

Congress has made a massive commitment to put together programs right now in the area of drug abuse. This type of action makes that job really very difficult. With the criteria you have enunciated as to how you would have handled this thing, I wish that you had been there when this was being born.

Mr. SPEIRS. Mr. Kildee, so do I, because I wouldn't be here today.

Mr. KILDEE. That would have been very nice for all of us, for the taxpayers and for the kids of this country, too.

Would you also provide for the record—we will keep the record open for two additional weeks—information such as resumes showing that each of the peer reviewers was an expert in the drug and alcohol abuse field?

Mr. SPEIRS. I would be glad to do that.

[Information in appendix.]

Mr. KILDEE. That is one of the criteria that the Congress has set for noncompetitive grants.

Mr. SPEIRS. Yes.

Mr. KILDEE. Also, could you provide information which demonstrates how the peer review resulted in the finding that the proposal was of outstanding merit. In other words, to give a grant that is not based upon a competitive process, then there has to be the finding by the peer review panel that the proposal is of outstanding merit.

If you could give us the background of the peer reviewers and something that would demonstrate how those peer reviewers concluded that the proposal was of outstanding merit.

Mr. SPEIRS. I would be glad to provide that.

Mr. KILDEE. You are really dealing with programs that are extremely important and you are dealing with dollars that are very important. I don't have any further questions.

Mr. TAUKE. Would the gentleman yield for one question?

Mr. KILDEE. Certainly.

Mr. TAUKE. Do you have copies in your files of the minutes of the board of trustees of the National Partnership?

Mr. SPEIRS. I have a draft copy of a meeting held on April 14. I believe there are some other minutes.

Mr. TAUKE. You could perhaps include in your submission to the subcommittee any documents that would give us an indication of the workings of the board of trustees, specifically minutes of their meetings. That would be helpful to us for our files. [Minutes retained in subcommittee files.]

Mr. KILDEE. There is, as we well know, a deep interest now in the whole field of drug abuse. We know that the appropriations committee as we sit here right now is trying to pull money from existing programs, to fund this new drug program without really impacting upon the deficit. Are you aware of any efforts within the administration and perhaps more specifically within the Justice Department to reach into OJJDP to find dollars to fund this new approach to drug abuse in this country?

Mr. SPEIRS. What has happened in the last approximately 6 weeks or so, is that the whole Office of Justice Programs, which has several components, has been asked to look at the programs, currently addressing the drug problem, programs that could possibly be used in 1987 to address that issue, and what types of possible redirection we could take with existing programs to have them reemphasize or redirect some of their efforts in prevention, treatment, et cetera.

Mr. KILDEE. I think we will be asking more questions as this develops. I am very concerned that in funding this new concern of the Congress and the administration that we don't as a matter of fact defund other programs in order to take care of this new drug program.

I look forward to working with you this remaining session of Congress and God and the voters willing in the next session of Congress to help do two things.

First of all, to serve the needs of the young people of this Nation, and to in so doing, be careful custodians of taxpayer dollars. I think those two things have to always be in front of us and one helps the other.

So I look forward to working with you on that and I appreciate your appearance this morning and your cooperation with the committee.

Mr. SPEIRS. Thank you, Mr. Chairman.

Thank you, Mr. Tauke.

Mr. TAUKE. Thank you.

[The prepared statement of Verne L. Speirs follows:]

PREPARED STATEMENT OF VERNE L. SPEIRS, ACTING ADMINISTRATOR, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DEPARTMENT OF JUSTICE

Thank you, Mr. Chairman, for inviting me to testify before the Subcommittee this morning concerning the Office of Juvenile Justice and Delinquency Prevention's grant to the National Partnership to Prevent Alcohol and Drug Abuse Among Youth.

As you know, the Partnership was established in October 1985 with a $1 million OJJDP grant amid high expectations that it would foster increased public and private sector involvement in combatting the problem of substance abuse by our Nation's young people. Unfortunately, these expectations were never realized. Therefore, soon after I became Acting OJJDP Administrator, I suspended further funding for the Partnership, and later, based on the findings of a subsequent program review, terminated the grant.

I have attached to my testimony a chronology of major events and OJJDP's monitoring of the Partnership grant. While I am prepared this morning to give the Subcommittee as full an accounting as possible of OJJDP's involvement with the Partnership, I would ask you to keep in mind that it was not until June 9, 1986, when I was named Acting OJJDP Administrator, that I first became involved in activities regarding the Partnership. Therefore, in preparing information for the Subcommittee about events up to that time, I have based my statements on the grant file records and my subsequent involvement in decisions concerning the Partnership.

The concept of a National Partnership emanated from the belief that the Federal government could play a significant and appropriate role in substance abuse prevention by providing a forum for citizens and private sector organizations to discuss the problem and by coordinating the activities of organizations working to combat this problem. To help the various organizations meet and share resources and ideas, OJJDP hosted a series of meetings during 1984 and 1985 attended by representatives from businesses, the media, citizens groups, Federal, state and local governments, and professionals such as drug and alcohol counselors, physicians, educators, and lawyers. These meetings led to the formation of the National Partnership to Prevent Alcohol and Drug Abuse Among Youth as a private, nonprofit corporation.

The goals of the National Partnership were as follows:

1. To promote the right of young people to grow up healthy.
2. To prevent self-initiated early experimentation with alcohol and drugs.
3. To increase the awareness and availability of alcohol and drug treatment services for youth.
4. To increase the availability of promising and effective approaches to alcohol and drug problems.
5. To promote social disapproval of drunkenness.
6. To eliminate use of illegal drugs.
7. To eliminate all use of alcohol by underage youth outside of parental supervision and liturgical functions.
8. To eliminate nonmedical use of prescription drugs by youth.

The Partnership leadership was vested in a Board of Trustees comprised of approximately 50 representatives of the four membership groups. The Board was responsible for establishing policy objectives and implementation strategies and for providing overall leadership. A separate Coordinating Committee was responsible for recommending policy objectives to be established by the Board. In addition, the Partnership's headquarters office was staffed by a president and four vice-presidents heading the main divisions of the Partnership--Communications, Development/Operations, Programs, and State and Local Partnerships. I have attached to my statement a chart showing the organization of the Partnership management.

The highest priority of the National Partnership was to establish state and local partnerships. The original objective of the National Partnership was to establish local partnerships in at least 20 states and 100 "anchor cities" by the end of the program's first year. This target later was reduced to the development of 34 to 60 state and local partnerships.

The other core function of the Partnership was to be the review, selection, and replication of model programs which could be implemented in jurisdictions across the country. The Program branch had three essential functions: identify drug and alcohol prevention projects worthy of replication; oversee implementation of selected projects; and arrange for technical assistance to members seeking to implement or improve projects of their own. By the end of its first year of funding, the Partnership was to have selected between 10 and 15 drug and alcohol prevention projects for implementation in conjunction with local partnerships.

In addition, the Partnership was to manage an awareness campaign designed to inform the public about the causes of and possible solutions to the problem of alcohol and drug abuse as well as educational programs for use by local partnerships in schools and civic forums.

To ensure adequate resources to begin this process of creating public and private partnerships and operate its other programs, the Partnership was awarded a $1 million OJJDP grant on October 10, 1986, for a one-year period. The National Partnership was expected raise an additional $1.5 million from private sources during its first year to continue the Partnership and supplement Federal funding.

OJJDP believed the Partnership would be able to achieve its stated objectives because of the commitment at the highest levels of government and the private sector and the expertise of project staff. After almost three months of operation, however, a site visit by OJJDP staff indicated that, while progress had been made in hiring staff and establishing operational procedures, the main work of the Partnership--developing programs and state and local partnerships and private fund-raising--had not gotten underway as quickly as had been stated in the time and task statement included in the grant application. The Partnership's own first progress report to OJJDP confirmed these findings. In addition, the Partnership was experiencing personnel problems between its board and its president and a chairman had never been appointed. Eventually, on January 27, 1986, an interim chairman was appointed.

Further site visits were made by OJJDP staff in an attempt to support the program and help the Partnership move towards its program goals. During these site visits, OJJDP staff briefed Partnership employees on Federal policies and procedures concerning the administration of a Federal grant and discussed with Partnership staff the approach, components, products, personnel resources, and time frames to be contained in the required project implementation plan which had not yet been completed. The implementation plan was required as a special condition appended to the grant award by OJJDP and was to have been submitted to OJJDP by January 10, 1986. These meetings follow the general procedures OJJDP employs when working with a new grantee with no proven track record of grant management.

However, as the Partnership fell further and further behind in making progress with the program, and after learning that the Partnership had already obligated almost half of its grant award, the OJJDP Administrator imposed a limited freeze on grant funds on February 28, 1986, until such time as the Partnership submitted the required implementation plan which was then six weeks late. The freeze curtailed all expenditures by the grantee except for salaries and fringe benefits for Partnership employees. A few weeks later, on March 14, 1986, the Partnership president resigned.

In its second progress report submitted in April 1986, the Partnership was able to report progress on a number of tasks, including the establishment of the first local partnership--in Mobile, Alabama--and the completion of its implementation plan, which because of the above-mentioned delays, included a revised budget and time and task statement. Fourteen other sites were in the preliminary stages of partnership development.

In May, however, OJJDP staff became concerned about a number of expenditures made by the Partnership and the OJJDP Administrator directed that a limited financial audit be conducted. The financial review was conducted on May 28, 1986, and two days later the Partnership's acting president was notified of the findings and the necessary corrective action. For example, we found that proper records were not being kept on the bills submitted by senior consultants, that the Partnership had no viable policy concerning travel by staff, and that there was no written policy concerning the use of credit cards issued by the Partnership to staff members. In addition, we found that the Partnership had authorized reimbursement for employees' expenses that could not be paid with Federal grant funds.

Corrective action was taken by the Partnership to address these problems. The Partnership reimbursed the grant for unallowable expenditures with private funds, staff reimbursed the Partnership for personal expenditures and, with the assistance of OJJDP, policies were developed for travel, use of credit cards, and for contracting with other organizations.

At the same time, concern was increasing in OJJDP that the management and financial problems the Partnership was experiencing was severely impeding its progress. By early June, after eight months of operation, only one local partnership had been established, $9,000 in private funds--from contributions and membership fees--had been raised, limited action had been taken to identify and begin efforts for the replication of exemplary programs, and some action had been taken to implement the national awareness campaign on drug and alcohol abuse, while almost all its grant money had been expended.

This was the situation I learned about when I was appointed Acting OJJDP Administrator on June 9, 1986. Because more than three-quarters of the grant funds ($764,000 or 76 percent) had been spent by the Partnership and program results were not consistent with the volume of dollars spent, on June 13, 1986, I notified the Partnership that funding was suspended pending a thorough review before a final decision was made concerning the future of the program.

Over the next several days OJJDP program staff and staff from the Office of Justice Programs' Office of the Comptroller and the Office of General Counsel conducted further programmatic and financial reviews. The reviews confirmed that, while Partnership staff had conducted themselves in a professional manner and a number of tasks had been conscientiously taken toward establishing the organization and in working toward the overall objectives, programmatic achievements were limited.

In addition, the Partnership had suffered from the beginning from a lack of stable leadership. Since the Partnership president resigned in March 1986, no one had assumed the presidency, nor had a permanent chairman of the board been found. Without proper management, the staff had a limited understanding of the program and policy goals of the Partnership and little guidance on implementation. The decisionmaking process was often hindered by disagreements between the president and the board or between senior and line staffs. There seemed to be no common understanding of the objectives of the Partnership and the means of reaching these objectives. And without the necessary leadership, the management of the Partnership never improved.

Therefore, on June 23, 1986, I notified the Partnership's interim chairman that OJJDP would not provide continued funding for the program and that Federal support would end July 31, 1986, which was the end of the first budget period.

Following this notification, OJJDP and the Partnership chairman agreed to close out the program. With the withdrawal of Federal funds and few private funds, the Partnership had no means to continue. Therefore, OJJDP and Office of Justice Programs staff worked with the Partnership to assist in the orderly close out of grant-supported activities and to determine severance procedures and payments for employees. On July 9, 1986, a close out agreement drafted by OJJDP was delivered to the Partnership, which was signed two weeks later by the Partnership's Acting Chairman of the Board. On July 31, 1986, the Partnership grant formally ended.

When the Partnership closed, its files were transferred to the possession of the Federal government and one Partnership staffer worked at OJJDP to complete the closing out of the grant program. There are currently a few financial matters related to the Partnership--payment of bills or refunds from contractors--that are being resolved through contact with a bookkeeper and the an attorney for the Partnership. At the present time, the Partnership grant has $35,144 of unobligated funds remaining from the original $1 million award. However, because there are these few financial matters outstanding, we do not yet have a final tally on the expenditure of funds under this grant.

Before responding to any questions you may have, Mr. Chairman, I would like to say that the final decision to terminate the grant to the Partnership should not be construed to be a reflection of the level of commitment of the Partnership staff to the goals of this project and that I understand the hardship this decision caused Partnership employees. I regret that circumstances necessitated this decision.

We believe the staff conducted themselves in a professional, conscientious, and responsible manner throughout the life of this program, particularly during the difficult days of the program close out. For a variety of reasons, however, the program's tremendous potential was never achieved.

OJJDP continues to endorse the original concept which led to the formation of the Partnership program and hope that we will be able to support efforts in the future to prevent alcohol and drug abuse by our Nation's young people. As you know, Mr. Chairman, this Administration is committed to ending the terrible toll drug and alcohol abuse exacts on our society, particularly our young people. We will continue to explore every avenue to find ways to bring an end to this plague that is ravaging our society and robbing our young people of their future.

Thank you, Mr. Chairman. I would be pleased now to respond to any questions you or members of the Subcommittee may have.

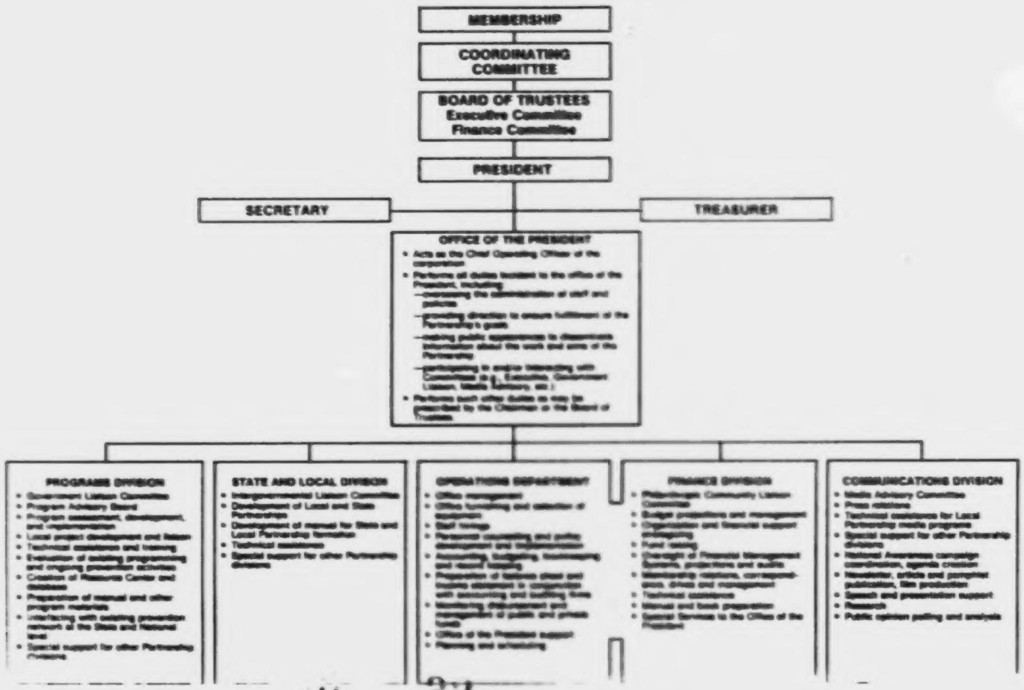
CHRONOLOGY OF EVENTS REGARDING THE NATIONAL PARTNERSHIP

October 3-4, 1984	1st meeting to organize the Partnership - with the media
November 13-14, 1984	2nd meeting to organize - with citizen groups
November 27-28, 1984	3rd meeting to organize - with business groups
January 10, 1985	4th meeting to organize - with professional groups
January 29-31, 1985	1st national meeting to organize the Partnership, Williamsburg, Virginia
April, 1985	NESC beings search to recruit senior executives, and Board of Trustees
June 7, 1985	Articles of Incorporation filed, Law Firm of Webster, Chanberlain & Bean provide legal services.
August 1, 1985	Grant period officially begins
Ausgust 1, 1985	NESC completes recruitement effort through October, 1985.
October 10, 1985	Grant awarded with White House ceremony and Kick-Off Dinner with Attorney General
December 10, 1985	Grant Monitor makes first official site visit
January 15, 1986	OJJDP staff Donahue and Porpotage make on-site visit and provide technical assistance to staff and learn that program is not proceeding on schedule
January 17, 1986	OJJDP staff learn of NESC sole-source contract for the first time during site visit
January 17, 1986	Partnership President attempts to fire Partnership's law firm on retainer when he learns of attempt by the Board to ask for his resignation
January 27, 1986	1st Board Meeting of Partnership — Robert Baldwin appointed as Interim Chairman
January 30, 1986	Assistance again provided to Partnership staff by OJJDP's Porpotage and Donahue
February 7, 1986	OJJDP again provides on site assistance
February 26, 1986	OJJDP staff on-site again to provide technical assistance learn that $482,000 of award has already been obligated
February 28, 1986	OJJDP Administrator imposes limited freeze on grant funds
March 14, 1986	President of Partnership, Rex Thomkins, resigns

March 19, 1986	Implementation Plan submitted to Office
April 1, 1986	OJJDP staff learn of Honeywell sole-source contract for ADP services
April 7, 1986	Sam Keker assumes Acting Presidency
April 14, 1986	Board of Trustees Meeting
May 9, 1986	OJJDP staff told of additional financial improprieties -- recommend full audit
May 19, 1986	OJJDP directs the Partnership to take corrective action including the forced resignations of senior consultants Gerrish, Coursen, and Stover
May 28, 1986	Porpotage and Neal Berg conduct limited financial review
May 30, 1986	Findings and corrective action of review delineated to Partnership
June 13, 1986	Partnership staff notified by Donahue and Porpotage that OJJDP Acting Administrator Verne Speirs has placed program in suspension status.
June 16, 1986	ABC and CBS networks air story on national news regarding Partnership
June 17, 1986	Assistant Attorney General Herrington given comprehensive briefing on Partnership activities by OJJDP staff.
June 17, 1986	Porpotage, Jack Nadol, and Neal Berg visit Partnership and discuss financial review and program review methodology.
June 18 - 19, 1986	Porpotage conducts program review by interviewing Division Directors.
June 20, 1986	Verne Spiers, Charles Lauer, Frank Porpotage, and Herbert Ellingwood visit Robert Baldwin in New York City and discuss close-out of Partnership.
June 23, 1986	Partnership staff given formal notice that program will formally end on July 31, 1986 and that government has claim of $81,971. Results of program review also shared with staff.
June 24, 1986	Letter sent to Partnership delineating major activities to be undertaken during close out of the program.
June 25, 1986	Partnership sends to OJJDP formal proposal to continue all staff through July 31, 1986.
June 26, 1986	Partnership staff formally notified that their proposal is unacceptable. Phase out plan for staff is suggested by OJJDP.

July 2, 1986	OJJDP notifies Partnership by letter that government cannot approve charges for dissolution of Partnership.
July 8, 1986	Formal response from Partnership on questioned costs is received by OJJDP.
July 8, 1986	OJJJDP and OJP officials conduct inventory of all grant purchased equipment and furniture.
July 9, 1986	A close-out agreement drafted by OJJDP is delivered to Partnership for consideration.
July 10, 1986	Acting President Arkin tells Porpotage that Interim Chairman Baldwin will not authorize the signing of the agreement by the Acting President.
July 11, 1986	First group of 5 staff members of Partnership leave employment status with the organization.
July 18, 1986	Porpotage, Herbert Ellingwood and Associate General Counsel John Wilson meet with Partnership attorney Alan Dye and discuss government's position on questioned costs, assignment of claim against the National Executive Service Corps, and the close-out agreement proposal.
July 24, 1986	Landlord for Partnership offices takes possession of Partnership furniture.
July 24, 1986	Partnership Board Chairman Robert Baldwin signs Close-Out Agreement.
July 25, 1986	2nd group of Partnership staff end employment status with the organization.
July 29, 1986	Landlord for Partnership offices agrees to allow government to take possession of Partnership furniture in return for "settlement" of lease for $46,856.
July 30, 1986	Government takes possession of furniture and files of the Partnership.
July 31, 1986	Partnership grant formally ends.
August 1 - 14, 1986	The last staff person of the Partnership, the financial officer Alexandra Rollins, works at OJJDP offices in closing-out activities of the grant program.
August 28-29, 1986	Alexandra Rollins again works on close-out activities at OJJDP offices. Makes request to have government pay for formal dissolution of the Partnership corporation.
August 29, 1986	OJJDP formally notifies Rollins and the Partnership that it will not authorize payment of any legal fees beyond the end date of the grant, July 31, 1986 and that the government cannot authorize federal grant funds to formally dissolve the corporation.

National Partnership to Prevent Drug and Alcohol Abuse Among Youth
MANAGEMENT CHART
Fiscal Year—1986


MEMBERSHIP
COORDINATING COMMITTEE
BOARD OF TRUSTEES
Executive Committee
Finance Committee
PRESIDENT
SECRETARY
TREASURER
OFFICE OF THE PRESIDENT
• Acts as the Chief Operating Officer of the corporation
• Performs all duties incident to the office of the President, including:
—overseeing the administration of staff and policies
—providing direction to ensure fulfillment of the Partnership's goals
—making public appearances to disseminate information about the work and aims of the Partnership
—participating in and/or interacting with Committees (e.g., Executive, Government Liaison, Media Advisory, etc.)
• Performs such other duties as may be prescribed by the Chairman or the Board of Trustees
PROGRAMS DIVISION
• Government Liaison Committee
• Program Advisory Board
• Program assessment, development, and implementation
• Local project development and liaison
• Technical assistance and training
• Evaluation of existing programming and ongoing prevention activities
• Creation of Resource Center and database
• Preparation of manual and other program materials
• Interfacing with existing prevention network at the State and National level
• Special support for other Partnership Divisions
STATE AND LOCAL DIVISION
• Intergovernmental Liaison Committee
• Development of Local and State Partnerships
• Development of manual for State and Local Partnership formation
• Technical assistance
• Special support for other Partnership divisions
OPERATIONS DEPARTMENT
• Office management
• Office furnishing and selection of equipment
• Staff hirings
• Personnel counseling and policy development and implementation
• Accounting, budgeting, bookkeeping and record keeping
• Preparation of balance sheet and income statement in conjunction with accounting and auditing firms
• Monitoring disbursement and management of public and private funds
• Office of the President support
• Planning and scheduling
FINANCE DIVISION
• Philanthropic Community Liaison Committee
• Budget projections and management
• Organization and financial support packaging
• Fund raising
• Oversight of Financial Management Systems, projections and audits
• Membership relations, correspondence, drives and management
• Technical assistance
• Manual and book preparation
• Special Services to the Office of the President
COMMUNICATIONS DIVISION
• Media Advisory Committee
• Press relations
• Technical assistance for Local Partnership media programs
• Special support for other Partnership divisions
• National Awareness campaign coordination, agenda creation
• Newsletter, article and pamphlet publication, film production
• Speech and presentation support
• Research
• Public opinion polling and analysis

Mr. KILDEE. Our next witnesses will consist of a panel: Mr. Samuel J. Keker, former acting president, National Partnership to Prevent Drug and Alcohol Abuse, Washington, DC; Mr. William Butynski, executive director, National Association of State Alcohol and Drug Abuse Directors, Washington, DC; and Mr. Ken Eaton, trustee of the National Partnership to Prevent Drug and Alcohol Abuse, Washington, DC.

If they would come forward.

STATEMENTS OF SAMUEL J. KEKER, FORMER ACTING PRESIDENT, NATIONAL PARTNERSHIP TO PREVENT DRUG AND ALCOHOL ABUSE; WILLIAM BUTYNSKI, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF STATE ALCOHOL AND DRUG ABUSE DIRECTORS; AND KEN EATON, TRUSTEE, NATIONAL PARTNERSHIP TO PREVENT DRUG AND ALCOHOL ABUSE

Mr. KILDEE. Mr. Keker, you will be our lead-off witness.

Mr. KEKER. My name is Sam Keker.

Thank you, Chairman Kildee and members of your committee for the invitation to testify before the subcommittee regarding the National Partnership to Prevent Drug and Alcohol Abuse among youth.

I will refer to the national partnership as—in the abbreviated form—the NP.

I think the committee is to be commended for undertaking an inquiry into this particular aspect in the conduct of public business. There are important considerations, short term and long term.

I cannot speak on behalf of the national partnership board of trustees, but I am pleased to offer observations from my own experience. Although my professional career has been mainly in the private sector, I have served on several public commissions and task forces. I retired from U.S. News & World Report in early 1984 as chairman of the board. I presently serve as chairman of the advisory council of the Maryland Department of Human Resources.

My association with the NP covers the period July 1985 to July 1, 1986, and falls in two distinct periods. In July 1985, I was recruited by the National Executive Service Corps, acting in behalf of the Administrator of the Office of Juvenile Delinquency, as a consultant to plan and help execute the mission of the soon-to-be-launched national partnership.

The nonprofit corporation was formally organized and launched in October 1985. It was launched with a designated president and chief operating officer, no full-time staff, and with a chairman and chief executive officer still to be selected. The bylaws called for the secretary to be the interim chairman of a nonprofit organization. The chairman did not materialize all through the remaining 1985 and an interim chairman was elected in January 1986, so we could get on with the business of the corporation.

My initial commitment was short term and limited. My responsibility was to recruit permanent staff for the communications and public affairs division and to act in a volunteer consultant capacity until the NP was off and operating. I reported to the president and served at his direction and pleasure. In mid-March, the president resigned.

On April 1, 1986, I agreed to assume the responsibility of acting president until a successor could be recruited at the instance of Mr. Baldwin, the chairman at the time. I served in this capacity until June 1986 at the direction and pleasure of the interim chairman of the corporation.

I resigned when I learned in mid-June that the operations of the NP were again being reviewed by a new administration of OJJDP and that a freeze on all program expenditures was directed pending his review—the second in less than 3 months.

The partnership was formally launched on October 10, 1985. It was dissolved in July 1986.

A central question before the committee must surely be how and why a unique public/private effort committed to a long range commitment to organize the country at the grass-roots level failed in its stated mission.

Admittedly, many factors contributed to the demise of the NP. Some major, some minor, but all of them incident in the start up of any ambitious initiative of a new organization.

I was surprised when I was approached to be associated with the national partnership that there had never been a coalition throughout the country of the various groups, alcohol, drugs, a caretaker, treatment centers, educators. They were all out there with their own turf battles, all fighting for the congressional private dollar. Again this country is one massive coalition, but the fact there was not a coalition to prevent alcohol and drug abuse among youth was mind boggling and the concept that you would have a small organization, get to the grass roots level, get people organized locally across all the boards, all the interests, the liquor interests, drug interests, youth interests, and do the thing locally.

Everything has been done. For years we have been screaming about drug and alcohol abuse. We are talking about billions of dollars reallocated in the current program.

The cry is, "Say no," but nobody has gotten down to the trench warfare that has to go on in this kind of program of doing it at a grass roots level and get people to stop wringing their hands and doing something about it in their own communities.

I dedicated myself to this volunteer effort. Many things have contributed to the demise of the national partnership, so I will limit my testimony to one major factor, that the progress and ability of the partnership to function in a viable way was impaired from the beginning by raid changes in leadership and direction in the administration of the grant by the Office of Juvenile Delinquency.

The fact that there was not in place a leadership, total leadership was a defect that had been promised would be taken care of in 2 to 3 weeks, but the fact that you started with an army, a crusade without a commander in chief is a defect right from the start.

So it was impaired from the beginning.

This took me a long time to make a decision in this connection, but whether this stemmed from lack of professionalism on the part of Government administrators, a different agenda from the partnership, or internecine warfare in various levels of the Justice Department, I can only surmise.

All I got was rumors and back and forth. I am a bystander. I had the responsibility to recruit permanent staff, we were organized

October 10, we had Government funds, we felt a responsibility for those Government funds, let's get the show on the road.

I can testify to specific instances which hobbled the partnership from the beginning. Some time in November, the national partnership—I specifically had people lined up to take on responsibilities—was instructed by the administrator not to discuss partnership matters with the deputy overseeing the grant and to contact only a designated subordinate.

In the same period, preliminary efforts to recruit key, full-time staff, vice presidents for communications, developing local partnerships and programs came to a standstill at the request, presumably, of the prospective chairman who was "coming aboard any day."

In other words, they were running prospective, don't do anything on communications, the ultimate success of the partnership, you are getting seed money from the Government, seed money of a million dollars—my understanding was presumably there would be another million dollars if progress had been made at the end of the grant period and in this interim year and a half period, this private/public organization would match those funds and private fundraising and replicate and duplicate and proceed much further than the original schedule.

Mr. **Keker**. Again, no permanent leadership coming on for the remainder of the year. In February, spending freeze was ordered by OJJDP on all new hiring, and pending a preparation of a revised implementation plan, and approval of the trustees.

Again, a freeze, submit a revised implementation plan, don't do anything, don't form local partnerships, until we do the revised plan yet approved by the Board of Trustees.

The original grant also had a plan to hire these people to move on, form local partnerships, and I never did figure out why the hell you had to stop doing what you were doing on your original program while you reviewed the thing and stopped and gone through all these administrative things, and then proceed.

This happened twice in the period of 3 or 4 months again, so eventually why the partnership failed, it did not show much progress, fell back on its original plan, this, that and the other, stop and go.

What do you expect?

More stops than go on the spending freeze, which was lifted in March. Full-time presence for communications and local partnerships were finally hired 6 months after launch, many standing in the wings.

It was not until March that any significant effort could be made to move forward. Within a few weeks rapid progress in developing local partnerships was being made.

In that few weeks, 8 weeks, there were 10 local partnerships well on the way to being formed throughout the country. Another 10 that were in the stages of negotiation, these things take time.

You are going to form the local partnership in the city of Chicago, a lot of people you have to talk to, and it doesn't happen in a week or a day. This was a long-term commitment, there has been $750,000 spent as of the end of June, fully a third of that went to startup costs.

You had a private corporation, no space, no typewriters, no commitment, so in effect it is the same thing you would have in establishing a school or a manufacturing plant or any kind of program, you have certain startup costs.

My estimate would be that fully a third or more of that money that was expended by the partnership were startup costs that should be viewed as amortization over a period of 3 to 5 years.

In other words, they were basic to the startup of the organization, and in the second 6 months or the following year, whatever funds were being raised would go towards the formulation of local partnerships.

In May, the Administrator of OJJDP resigned, and the successor informs the grant was being reviewed. A week later, the decision was not enough progress was being made.

The testimony I am making here is not the complete story on the demise of the national partnership, and there were other factors contributing to it.

Overall, they got off to a bad start, did not have the necessary leadership, and within our partnership, a great opportunity has been lost, and I would hope that down the road another agency, some kind of national coalition has to be formed, funded, whether it is public, private or public-private, but one of the avenues, if the committee is interested in this whole area, is that the rhetoric and hand-wringing and all the other things that are going on presently, and in the past, it is not going to show much improvement until you do the dirty work in the trenches, and that is what this partnership was set up to do.

The discussion here is drug abuse, that has been raised, the great thing that is going to disable this country, and even today as we sit here, alcohol abuse among children, our families in our society, is a much greater danger than drug abuse presently.

I think that there are others here that can testify. We are not even talking about the alcohol abuse that goes on in this country.

Mr. KILDEE. Thank you very much, Mr. Keker.

[The prepared statement of Samuel J. Keker follows:]

PREPARED STATEMENT OF SAMUEL J. KEKER, FORMER ACTING PRESIDENT, NATIONAL PARTNERSHIP TO PREVENT DRUG AND ALCOHOL ABUSE

My thanks to Chairman Kildee for his invitation to testify before the Sub-Committee regarding the grant to the National Partnership to Prevent Drug and Alcohol Abuse Among Youth. (The NP) The committee is to be commended for undertaking an inquiry into this particular aspect in the conduct of the public business.

I cannot speak on behalf of the National Partnership Board of Trustees but I am pleased to offer some observations drawn from my own experience. Although my professional career has been mainly in the private sector, I have served on several public commissions and task forces. I retired from U.S. New & World Report in early 1984 as Chairman of the Board. I presently serve as Chairman of the Advisory Council of the Maryland Department of Human Resources.

My association with the NP covers the period July 1985 to July 1, 1986 and falls in two distinct periods. In July 1985 I was recruited by the National Executive Service Corps, acting in behalf of the Administrator of the Office of Juvenile Delinquency, as a consultant to plan and help execute the mission of the soon to be launched National Partnership. The non-profit corporation was formally organized and launched in October 1985. It was launched with a designated president and chief operating officer, no full-time staff, and with a chairman and chief executive officer still to be elected - presumably in a matter of weeks. An interim chairman was elected in January 1986.

My initial committment was short term and limited. My responsibility was to recruit permanent staff for the communications and public affairs division and to act in a volunteer consultant capacity until the NP was off and operating. I reported to the president and served at his direction and pleasure. In mid March the president resigned.

On April 1, 1986 I agreed to assume the responsibility of acting president until a successor could be recruited. I served in this capacity until June 1986 at the direction and pleasure of the interim chairman of the corporation.

I resigned when I learned in mid June that the operations of the NP were again being reviewed by a new administration of OJJDP and that a freeze on all program expenditures was directed pending his review -- the second in less than three months.

The Partnership was formally launched on October 10, 1985. It was dissolved in July 1986.

A central question before the committee must surely be how and why a unique public/private effort committed to a long range committment to organize the country at the grass roots level failed in its stated mission.

Admittedly, many factors contributed to the demise of the NP. Some major, some minor, but all of them incident in the start up of any ambitious initiative of a new organization. The Sub-Committee will undoubtedly hear testimony from others in these areas in the course of its inquiries.

I will limit my testimony to one major factor. The major factor, in my judgment, is that the progress and ability of the Partnership to function in a viable way was impaired from the beginning by rapid changes in leadership and direction in the administration of the grant by the Office of Juvenile Delinquency. Whether this stemmed from lack of professionalism on the part of the government administrators, a different agenda from the Partnership, or internecine warfare in various levels of the Justice Department, I can only surmise.

What I can testify to are specific incidents which hobbled the NP in a serious way in accomplishing its basic organizational and programmatic tasks from the very beginning.

For example, sometime in November, the NP was instructed by the Administrator of OJJDP not to discuss partnership matters with the Deputy overseeing the grant and to contact only a designated subordinate.

In this same period, preliminary efforts to recruit key full time staff, vice presidents for communications, developing local partnership and programs came to a stand still at the request, presumably, of the prospective chairman who was "coming aboard any day." These instructions came from the president, but my positive inpression is that OJJDP initiated, or at a minimum concurred in these personnel delays. I do not know if the president resisted these delays.

Just as importantly, and cruical to ultimate success, was the delay in moving ahead with fund raising efforts from the private sector. Again, the fund raising effort was postponed pending the acceptance of the chairmanship by the prospective candidate.

In February a spending freeze was ordered by OJJDP on all new hiring, travel and program development pending the preparation of a revised implementation plan and approval of the trustees. More stop and go the spending freeze was lifted in March a full time vice presidents for communicatons and local partnerships were finally hired - six months after launch! It was not until March that any significant effort could be made to move forward externally.

Within a few weeks rapid progress in developing local partnerships was being made.

In May, the administrator of OJJDP resigned. Early in June his successor informed the NP the grant was being reviewed and pending a final decision by the new administrator, another financial freeze was imposed on all activity. After what appears to me to have been a casual and cursory review, the grant was terminated.

Granted, the testimony submitted herewith is not the complete story on the demise of the NP. I reiterate, however, my judgment on the major factor which contributed to its disolution.

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Mr. KILDEE. Mr. Butynski.

Mr. BUTYNSKI. I would like to thank you for the invitation to appear and to testify on this important subject of the national partnership before your committee.

I would like to preface my remarks by indicating that my statement represents my personal views as a professional with 17 years' experience in the alcohol and drug field, and the remarks should not be construed as necessarily representing those of the organization for which I work, the National Association of State Alcohol and Drug Abuse Directors.

On the assumption that the full written testimony will be entered into the hearing record, I would like to verbally summarize my remarks.

Mr. KILDEE. Yes; we would appreciate it.

Mr. BUTYNSKI. I would like to organize my remarks in four areas, background and need, concept, problems and recommendations for the future.

In terms of background and need, it is clear that alcohol and drug abuse pose severe economic costs to our society overall, but also that drug abuse by youth is closely related to other forms of juvenile delinquency.

There are various statistics cited here, and you may be more familiar with than I am in terms of the relationship between alcohol, drug abuse, and delinquency.

In terms of concept, the idea of the national partnership to prevent drug and alcohol abuse was rather ambitious, but with appropriate support and leadership, a viable concept that had a tremendous positive potential for stimulating public awareness and for creating an ongoing mechanism for sharing information for the public and private sector to work together in combatting alcohol and drug abuse problems among youth.

With regard to the problems encountered by the national partnership, there are a number. I will discuss three areas of problems as I saw them.

One, expectations; two, leadership; and three, communications.

First, in term of expectations, as far as I know, a clear and detailed program of work was never reviewed nor adopted by either the membership of the partnership, nor by the board, prior to submission to the Justice Department.

Thus, five people had different expectations as to what could and should be accomplished.

Second, in terms of leadership, overall, there was considerable prestige, expertise, and competence in terms of honorary leadership. The First Lady, Senate Majority Leader Dole, House Speaker O'Neill, all lent their names to the partnership.

However, a permanent chairperson was never selected nor elected by the board of directors. Also, most of the initial staff of the partnership did not have either extensive knowledge or direct experience in working on alcohol and drug problems.

In terms of communications, it is evident at this point that insufficient communication occurred among many of the components relating to the national partnership, ranging from the president to the board, between the president, board, and the members, between the president, board, and the alcohol and drug field, et cetera.

In terms of recommendations for the future, I would suggest that consideration might be given to the following guidelines:

First, that grants should be awarded only to established organizations with proven records of accomplishment, or if awarded to a new entity, should be directly supported by some other known groups who have some clearly designated responsibility to nurture the new organization until it can stand alone as a fully responsible entity.

Second, the expectations in terms of specific grant objectives, methods and time frames, should be clearly communicated to all responsible parties, including the board of directors, staff, as well as to other significant parties, the members of the partnership.

Finally, as the Department of Justice awards future grants and contracts in the drug area, I would recommend that it should work in even close collaboration with other appropriate Federal agencies, specifically the Alcohol, Drug Abuse and Mental Health Administration. They have the demonstrated experience in this area, and if they had been involved in joint funding or joint oversight of the partnership, we might well have had much greater success.

I would be pleased to respond to any questions that you or other committee members may have.

[The prepared statement of William Butynski follows:]

PREPARED STATEMENT OF WILLIAM BUTYNSKI, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF STATE ALCOHOL AND DRUG ABUSE DIRECTORS

Chairman Kildee, distinguished Committee members and honored guests I would like to thank you for the invitation to appear before your Committee and to discuss the important subject of the National Partnership to Prevent Drug and Alcohol Abuse. I wish to preface my remarks by indicating that my statement represents my personal views as a professional with 17 years of experience in the alcohol and drug field. The remarks should not be construed as representing the views of the organization for which I work, the National Association of State Alcohol and Drug Abuse Directors.

With regard to the U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention grant to the National Partnership to Prevent Drug and Alcohol Abuse I have organized my remarks around the following four topics: (1) background and need; (2) concept; (3) problems; and (4) recommendations for the future.

In terms of background and need it is clear that not only do alcohol and other drug abuse pose severe economic costs to our society, but also that drug abuse by youth is closely related to other forms of juvenile delinquency. Data from a variety of relevant reports and research studies is summarized and/or excerpted below:

- o The annual economic costs of alcohol and other drug abuse to our society in 1983 have been estimated to exceed $176.4 billion (Research Triangle Institute report for the Alcohol, Drug Abuse and Mental Health Administration, 1984).
- o In 1980 almost one-half of serious juvenile offenders were also users of a variety of illicit drugs, e.g., the rate of marijuana use among chronic serious juvenile offenders was 14 times higher than the rates of use by nonoffenders (Ellicott and Huizinga, National Youth Study, 1984)
- o The proportion of youthful drinkers of alcohol and users of marijuana with delinquencies is approximately twice as high as the proportion among abstainers (Akers, Drohn, Lanza-Kaduce, and Radoevick, Boys Town Study supported by the Boys Town Center for the Study of Youth Development, 1979.
- o Serious drug involvement is a significant contributor to as well as an indicator of high rates of most forms of criminality (Johnson, Wish and Huizinga, The Concentration of Delinquent Offending: The Contribution of Serious Drug Involvement to High Rate of Delinquency, 1983).

In terms of concept I feel that the idea of a National Partnership to Prevent Drug and Alcohol Abuse was rather ambitious, but, with appropriate support and leadership, a viable concept that had a tremendous positive potential for stimulating public awareness and creating an ongoing mechanism for the public and private sector to share information and cooperate in combatting alcohol and drug abuse problems among youth.

With regard to the problems encountered by the National Partnership there were a number. These problems included, but were not necessarily limited to, the following areas: expectations, leadership and communications. Each of these three major problem areas is described further below:

- o Expectations - A clear and detailed program of work was, as far as I know, never reviewed nor adopted by either the membership or the Board of Directors, prior to submission to the Justice Department; thus different people had different expectations as to the specific objectives of the Partnership, the methods by which objectives would be pursued, and the timeframes that would be followed.
- o Leadership - Overall, the prestige, expertise and competence of many of the honorary leaders of the Partnership was impressive. First Lady Nancy Reagan, Senate Majority Leader Dole and House Speaker O'Neill all lent their names to the Partnership. However, a permanent Chairperson was never selected nor elected by the Board of Directors. Also, most of the initial staff of the Partnership did not have extensive

knowledge or direct experience in working to develop or implement alcohol or drug programs or services at a national or state level.

- Communications - Insufficient communication occurred among many of the components of the National Partnership (e.g., between the President and the Board of Directors; between the President/Board and the members; between the President/Board and prospective members; between the President/Board and the alcohol and drug field; between the President/Board and the private sector). Also, it appears that the communications between the Justice Department and the Partnership President/staff were not as constructive as they could have been.

In terms of recommendations for the future I would suggest that consideration should be given to the following guidelines:

- Grants should be awarded only to established organizations with proven records of accomplishment, or, if awarded to a new entity, should be directly supported by other known groups who have some clearly designated responsibility to nurture the new organization until it can stand alone as a fully responsible entity.

- The expectations in terms of the specific grant objectives, methods and timeframes should be clearly communicated to all responsible parties (e.g., to the Board of Directors and staff leadership of any new organization), as well as to other significant parties (e.g., to organization members and to relevant field groups).

- As the Department of Justice awards future grants and contracts in the alcohol and drug area it should work in even closer collaboration with other appropriate federal agencies (i.e., the Alcohol, Drug Abuse and Mental Health Administration); joint funding of such alcohol and drug projects could serve to strengthen both oversight and potential positive outcomes.

I would be pleased to respond to any questions that you or other Committee members may have.

Mr. **Kildee**. Mr. Eaton.

Mr. **Eaton**. I am delighted to be here, Mr. Chairman. Mr. Tauke, it is good to see you, and I appreciate the incisive questions that you asked of the prior witness, and with your permission, I would like to address a few of those myself.

By way of my background, I have been involved in the field for a long, long time, beginning in Iowa, operating a statewide demonstration project in alcoholism for the Governor there, and later as the Deputy Director of the National Institute on Alcohol Abuse and Alcoholism, and later also in Michigan, for that State government.

My involvement was initiated at the same time that was initiated. I would be happy and would like an opportunity to provide additional information. I do have copies of board meeting minutes, other documents that will provide expanded information about how things happen, and who did what and so forth.

I would be happy to go through that if you wish, and provide additional information later on.

Mr. **Kildee**. The committee very much wishes that.

Mr. **Eaton**. I must at the outset make two points. One, I resist the sense that the partnership had been a failure at the time the grant was terminated.

Mr. Keker has mentioned several reasons for that, and I concur with his observations and will add a few of my own to that. I must also point out that a Federal grant or a new nonprofit corporation was not in anybody's mind when this initiative was begun.

It was begun through a series of discussion meetings which were called by the Office of Juvenile Justice and Delinquency, and most of us appreciated that leadership.

Three separate meetings were held very early, October, November 1984, calling together representatives of media, including the National Broadcasting Corp., advertising agencies and other groups involved in media.

Another meeting was held with members of the private sector, business corporations, so forth. Another meeting was held with citizen groups and organizations that were involved, and still another with professional organizations such as ones with which I am affiliated, and Dr. Butynski is affiliated.

The discussions in these meetings did not anticipate a result. It took some time to review the nature, extent, and seriousness of drug and alcohol problems and raised questions as to whether or not, together all of us might do a more effective job than we can each do separately and on our own, and the response to those discussions and those questions frankly were resounding yeses.

Yes; it is a serious problem, and we all have a responsibility to do even more than we are, and we can probably be more effective if we work together, and combine our efforts than we can be continuing to work separately.

With those conclusions, and at the urging of many, a meeting was called, scheduled in Williamsburg, occurring in January 1985. I know it was snowing and very cold.

Over 200 people attended this meeting. The core groups were the same groups of people that were represented at the prior meetings.

There, we hammered out over about a day and a half the same kinds of issues.

We broke into small groups, created task forces, looked at the problem and did some analyzing as to what kind of structure might permit a combined and a collective effort to occur among the various and sundry organizations including the Federal Government that might be involved or might need to be involved in reducing the problems of alcohol and drug abuse throughout the Nation.

Still, even then, there was no discussion of a brand new corporation or a Federal grant, least of all a Federal grant. It was becoming apparent that some structure would be necessary in order to accommodate this coalition effort, and ultimately in some meetings later of steering and coordinating committees, with some reluctance.

It was agreed that a new nonprofit corporation should be formed to accommodate that, and at still a later point, it became apparent that there was a possibility of some Federal support, and that notion was pursued as well.

Throughout that entire period, 6 to 9 months, it lasted until late the following summer of 1985, where many of us were occupied with the drafting of articles of incorporation, by-laws, and other parts of the future structure of the partnership, and we specifically were pleased to work with the National Executive Service Corps, and they were willing to lend their efforts in recruiting what we thought of to be a prestigious board of trustees with the capacity to provide important leadership and representation of the evolving partnership.

They did an excellent job with this. If you have not seen one before, I would be happy to provide you with a list of those trustees. The operation finally became real, as Mr. Keker mentioned, in October, October 11.

I won't repeat some of the subsequent activities that began at that particular point, because you have already heard them, and there are areas I can expand on, I will be happy to do so.

I should emphasize that this concept really came from the variety of organizations and people who were meeting at the encouragement of the office, but this was not just an office effort.

This was an effort that had the full participation and the full support of a large number of organizations and professional individuals who had been working for a long time in the field.

We were pleased to see the stimulus provided by the office and pleased to see them able to accommodate meetings and assist in communications about those meetings, so we all knew what different committees were doing, and task forces, and I felt that was a very helpful and appropriate role for the office to play.

It is not possible for me to comment about such things as review processes, whether they were appropriately done. I would suggest, however, as someone outside the Federal Government, even though I sat in roughly the same chair as the person responsible for promulgating grant award processes, so forth.

I think spurring that partnership was a very appropriate and a necessary effort on the part of the Office of Juvenile Justice and Delinquency.

I cannot bring myself to defend the amount of money that was spent in the short period of time, and in retrospect, it clearly would have been wiser if a grant were to be awarded or assuming that one was, to have phased those expenditures, to put some milestones in, and I think, as Verne Speirs mentioned, manage the daylights out of the grant so that the partnership did not have a full-time chairman, and its executive committee, which we did not at that point, then certain expenditures should not have occurred until those things had been achieved.

Frankly, no one thought that these delays in leadership would occur. We were in an active discussion with a prominent American with the chairmanship. He was extremely interested, agreed to serve on the board of trustees, withheld his agreement to serve as chairman until a couple of critical matters in his personal and professional responsibilities had been taken care of.

They represented unfortunate delays, but it was not anyone's expectation, and they were matters which were beyond his and our control and delayed the selection of an executive committee, so the board of trustees generally found itself depending upon the single individual, the senior management person there which was in place, and there was not a good vehicle for the board itself to be involved at that time in the absence of an executive committee, and a permanent chairman.

Those are normally the mechanisms that an organization would use to involve the board as opposed to meetings of the 40, or 60-member board of trustees, so there were clearly a great many communication gaps only between the partnership and the Department of Justice, but within the partnership as well.

These problems, I began to feel sanguine about in January, when we determined we should not wait further for the selection of a chairman, and when we met in late January and asked Bob Baldwin to serve as interim chairman and take care of matters until such time as we could recruit a full-time and permanent chairman, and we also appointed at that same meeting an executive committee to look more carefully at the day-to-day operation and management of the partnership and its relationships and by then, conflicts with some staff members in the Office of Juvenile Justice and Delinquency.

I felt we were getting on top of things as a member of the board. I was in Washington and able to see more closely than some other trustees who lived outside the area, and I talked with Bob Baldwin on several different occasions.

There were changes in the senior management, as Mr. Keker has mentioned. There were initiated what I thought were close and promising communications between our new interim chairman, and the Department of Justice.

They unfortunately didn't come to the fruition that I was hoping, but I think the partnership was at that point in a position to become successful. That is why I resist the assumption that the partnership had failed at the point at which the grant was terminated.

I don't question the propriety of that decision having been made on the part of the office. They did what they felt was proper and the wise thing to do in terms of the protection of public funds, and I must, of course, respect that.

I would like to stress that with respect to the use of money on the part of the partnership, that the documentation that I have seen, this does not necessarily justify whether or not the initial grant should have had so much money in it or whether it should have had as much money for personnel, offices or travel in it, I can't remark about that, but I can remark to the effect that basically speaking, the expenditure of public funds by the partnership was consistent with the approved budget contained in the grant award.

There were several areas ultimately which were questioned. I don't remember what all of them were. We could provide that, but that was some $81,000 that was mentioned before, and as an example, one of the staff persons who came aboard was provided with a short-term loan to carry over.

I don't know whether that was moving expenses, so forth. This is not unusual in the private sector. It was not appropriate in particular case because that was not something called for in the budget.

The resolution to that was to have had the individual pay the money back, which happened almost instantly when it was brought to the partnership's attention.

There were a few other matters of that particular nature, and one or two outstanding issues like that, but those exceptions, the ones that were included in the documents shared with me, did not in any way imply that anyone had absconded with money, and they were by and large technical matters of the nature that I just mentioned to you, the loans, so forth.

I would be happy to provide a list of those kinds of things. I would hope that the fact that those questions were asked about several expenditures would not permit the implication that the partnership misused Federal funds.

My impression is that they used the Federal funds in the fashion with which the grant award called for them to be used.

It may not have been the best budget, I mean, maybe the way the grant was made or the amounts of money included should have been different, and I concur that I think there could have been a tighter management both on the part of the partnership and the Office, in terms of what happened on a day-to-day basis.

With that, I will discontinue except to emphasize the remarks that both other witnesses and that members of the committee have mentioned. The purpose was extremely important purpose. It still is an extremely important purpose, and the notion of finding a mechanism by which the public and private sector can collaborate to deal with these problems is extremely important still.

I am very sorry that this effort didn't work out. I think it had great potential. Perhaps it was too ambitious. The pattern and timing of management appointments created more problems than anyone anticipated, and I am afraid that perhaps there was a smattering of panic in the response of the office as these problems began to be uncovered.

I wish we could go backward in time and look at these problems, and the mistakes that were made, redo them and see this initiative doing what it needs to be doing.

We can't turn the clock back and change some actions that were taken, but I would emphasize that I think there was a serious and a conscientious effort made on the part of not only the staff of the partnership but of those on the Board of Trustees who were active and there was a well-intended effort on the part of the Federal Government as well.

I deeply regret that we are needing to talk about it in the tone we have to today, because it is not out and doing what we would all like for it to do. I would be happy to provide any other information or answer questions.

Mr. KILDEE. Thank you very much, Mr. Eaton.

I was not going to dwell too much on the expenses, but let me ask you this: I think that in some of these unallowable expenses, we do find a symptom of a careless attitude toward taxpayers' dollars.

I consider that a mortal sin in Government, I really do. I think that is a very, very serious thing when there is a careless attitude towards taxpayers' dollars. That is a most serious offense.

For example, the payment of airfare for the fiance of an employee. That shows a rather careless attitude, almost felonious attitude maybe, towards the taxpayers' dollars.

What gave rise to even the impression that that could be done with Federal dollars now? You say that in a private company, these sorts of things, including personal loans are very often done.

I worked for many an employer; I have never been able to get a personal loan out of any of them.

Mr. EATON. I haven't, either. The point I am trying to make about those, Mr. Chairman, and unfortunately, we did not have one on the staff thoroughly familiar with Federal regulations.

Mr. KILDEE. How about morality?

Mr. EATON. Again, I don't have the details, I wasn't there, and it is unfair for me to suggest motivations or reasons for this kind of thing. As a new person is being recruited to accept a job, and in this case, probably there was a request, could you cover the airfare for myself and my fiance from wherever they were, moving to Washington to take the new job, that is not something that is possibly to be done with Federal funds, but it is not so unusual in a large corporation that—from which many of the people in the partnership came prior to that.

Again, the solution to that is to have that corrected.

Mr. KILDEE. Private corporations are for-profit. The Federal Government has a huge deficit. Now, for-profit companies that want to do that, that is their business, but I tell you, I think there is a lack of morality when that attitude prevails with the use of public funds.

I am looking for symptoms here, and I am dumbfounded by that lack of a careful attitude towards taxpayers' dollars. I didn't want to dwell on that.

Mr. EATON. I asked for that.

Mr. KILDEE. That is one of the advantages of having the gavel up here.

Let me ask more general questions now of yourself maybe at this point, and Mr. Keker, you may join in, and you may join in, too.

The original grant application, which was one of the things I assume gave the OJJDP the reason to think this was a program they wanted to fund with taxpayers' dollars, predicted the establishment of 211 local partnerships. In April of 1986, that number was revised with the approval of the OJJDP to five model partnerships, but by June, the national partnership had established only one partnership in Mobile, AL.

Why were the proposed number of partnerships so drastically reduced in the revised implementation plan?

Mr. EATON. Mr. Keker will probably wish to remark about the one versus five. The 211 number, and I can't tell you where this slipped between concept established by people working in the partnership and the time it got put on paper, but the 211 came from a concept of using the national media markets, and they are pieces of geography that fit into a somewhat natural broadcasting media market.

As our task forces worked on that, because we were going to attempt to use local media and enlist the assistance of the National Broadcasters in doing so, it made sense to look at this as a strategy, a general way of organizing our thinking and approach and so forth.

I am not sure how or when that became translated into the formation of 211 local partners. It was never the concept to do that, certainly not within a short period of time like a year.

Mr. KILDEE. It was put in the grant application?

Mr. EATON. It was. I have not seen the approved grant application part that specifies that, but it clearly was. Otherwise, there wouldn't have been the references to it or a need to make a change.

I am remarking to the fact the concept was given birth to and the time it got put on paper, somehow something slipped and it became translated into an ambition of establishing 211 local partnerships.

Mr. KEKER. That 211 is immaterial. In the original grant, OK, you are shooting for the Moon. Sure, there was slippage. Programs are revised, you got a launch date for January 1, things go wrong so you come up with another date.

The 211 figure, if you organized local partnerships, 211 markets, you would cover the country, and in effect, you would have a total coverage of the concept to form local partnerships.

The initial grant called for roughly the formation of 100 partnerships in the first year, and this is in the planning stage, without having tested the market, and no one in the partnership or OJJDP had gone out and actually attempted to form a local partnership in Detroit or in Mobile, so whether it took a day to do that or a week or whether it took a month, nobody knew until you actually did it.

All right, on top of, again, going beyond the concept without knowing what your program is, how many people it takes, on top of not hiring people that were supposed to do this particular function, OK, you slipped further and further back.

There was nothing wrong with the original concept, I mean it was roughly 100 markets; that is 100 local communities. It became pretty apparent, with the amount of money the partnership had, its inability to go out and get money, raising money, matching, internally we as consultants and the leadership saw no reason, if you had a $1 million grant from the Government, that you ought to be out there raising $5 million, to really do what the national partnership needed to do, to staff, have the number of people and all the rest that needed to be done, that it would take $5 million or more dollars to even make a dent in those few markets.

OK, you don't have staff, so on, you are slipping behind, and you continue to develop local partnerships and the freeze was put on, and the plan is revised on the basis that you can't do 100, you are going to do 5 or 10 local partnerships and continue to develop another 10 or 20, and by that time, it became apparent it took several weeks, a project person in the local community, it was a huge job that had to be tailored back to the funds that were available, and presumably, it could get started, show some progress, and you could do it at fuller speed.

We were well on our way to develop 10-to-20 partnerships in March, April, and May of this year, if we had gotten them going, again, success, the next 20 would have come a lot easier.

Get together here folks, and get on the bandwagon. We never got the bandwagon growing.

Mr. **Kildee**. I appreciate your answers. The 211 then was an objective number based upon marketing areas in the country?

Mr. **Keker**. Right, the morality and the expenditure of public funds, you are right, I share what you have to say in that connection, but again, for example, me personally and perhaps some of the others, the staff, their careful attention about what could be spent from Government grant funds and the partnership was formed that it in effect had two budgets, a Government grant and you could only expend money from that budget for certain purposes, and these were admittedly not purposes you could spend from grant money, and we knew that, or should have known, and expend money from private funds, a private fund budget.

And this had to do with entertainment, people that came to town, contacts, things not allowable in the Government grant, and there was a private fund budget which never really got funded.

Also, you couldn't spend Government funds to go out and raise funds. You had to raise private funds to go out and raise funds to match these Government funds and go beyond your original grant.

Again, as an administrative matter, the partnership hired a local accounting firm of good reputation, McWade & Capron, who had extensive business experience in what is permissible under Government grants, they do accounting for other grant firms and they guided us in this area, what is permissible from a grant fund, and if you need to do this, you have to do it from private funds.

I submit to you, when it was called to our attention that the loan, the $1,200 to a man that was moved from the west coast and practically getting started, expenses, when it was called to our attention that this was impermissible under grant funds, it was immediately moved from the grant fund to the private account as far as showing on our books, a loan from our private funds, and when it kept coming up after it had been taken care of, pay it, get it off our books, forget about it.

That happened weeks, months ago and talking about communications here, it didn't seem to get through the OJJDP records or offices, because it keeps coming up as an outstanding item, which was taken care of when it was called to our attention, and particularly on this other matter about the finance, getting moving expenses, a question was raised in California, we are not going to argue whether it is fiance or commonlaw wife, this was an established household of 5 years, and again, whether it is impermissible from grant funds, the question was raised, reimburse the Government grant account, and the individual did.

Again, a couple of bookkeeping instances, a $750,000 budget and others that came up on entertainment accounts, we went through this, Lord knows the amount of time we spent, every single voucher which the accounting firm backed up twice, not once, but twice going back, there was a $320,000 unauthorized government expense.

Mr. **Kildee**. Were you told by the OJJDP not to engage in private fundraising until the chairman was brought on board?

Mr. **Keker**. No; the direction I got from the President, at some point after organization, October 10, we had hired a Vice President for Fund Raising, an operations manager, but no Communications Vice President or a local development or Program Vice President.

The fundraising effort, OK, we need some money here, matchup. We got a big program going here, we need another million dollars, get on the stick real quick. The word I got directly from the President, one on both the fund raising and on hiring staff, one we have a chairman coming aboard, and he would like to review the fundraising efforts, and communications efforts, and he wanted veto power, OK, 2, 3, 4 weeks, but again during this organizational period, cooperation from OJJDP, my impression is that this was also—because there were people from OJJDP in contact with this prospective chairman, and whether it is coming to the President from that circle, I mean, everybody was in agreement, that we hold off in these two very critical areas. Permanent staff to do the fundraising.

Mr. **Kildee**. How much private funds did the national partnership raise?

Mr. **Keker**. I don't think that they raised more than $5,000 to $10,000, which were just kind of to cover articles of incorporation. There was no great effort, printing, all that kind of thing.

There was no positive effort made.

Mr. **Kildee**. What is the status of the national partnership at this time? Are you still existing?

Mr. **Eaton**. I have not received any communication to the contrary. I have no notices that the corporation has been dissolved.

Mr. **Keker**. It eventually will be dissolved as a corporation.

Mr. **Kildee**. After the Federal grant was terminated in July, then, in effect, then national partnership began to disappear?

Mr. **Keker**. Yes, it had lease and legal obligations. It had a lease on space, equipment, leases on typewriters, again saving Government money rather than buying them, spending another quarter of a million dollars right up front for equipment which was necessary to run an office, they were leased, and the obligations ran over a period of years, including the space lease, and that had to be negotiated out.

Mr. **Kildee**. After that grant was terminated in July, did the board consider going out to the private sector to try to raise money to stay in existence?

Mr. **Eaton**. Thus far, there has not been any active discussion about that. We have not had a board meeting since the time that the grant was terminated.

Mr. **Kildee**. So, you felt it would have been futile to go out to the private sector to seek funds?

Mr. **Eaton**. At least I think that the people involved were very frustrated with this experience. Most of everyone's efforts were voluntary efforts. We had people traveling from New York, Chicago, and it is more likely that people are just bewildered.

I am not sure that we know what a good direction would be now, if any, and probably with the controversy, many are feeling that would be perhaps the most appropriate thing, to let someone else start the same kind of effort in the future.

Mr. **Kildee**. The umbilical cord to the Federal Government was an essential thing, then?

Mr. **Eaton**. At that particular time, it was. As Sam mentioned, our plans to engage in private fundraising were held up. I agree, everyone was in concurrence with that. At that time, it didn't really make sense to launch a large private fundraising effort.

We felt that we needed the difficulties to be resolved and taken care of, that we had the partnership on good solid ground, and in a good solid direction before we approached the private sector with fundraising.

Mr. **Kildee**. What will happen to the equipment and any material actually leased or owned by the national partnership?

Is there a caretaker around?

Mr. **Eaton**. One of the staff remained on board to work with Justice to deal with all of those issues. I have no personal knowledge of that.

Mr. **Keker**. They were negotiated out, once the decision to terminate the grant was on such short notice, well, again dealing from my own experience, if a decision had been made to terminate the partnership say, in March or February, if that was determined, I have no way of knowing what the internal judgment or decision was, the partnership probably could have been phased out in a much more orderly fashion which perhaps would have given the trustees an opportunity to perhaps continue or at least look at the situation without getting into a kind of sledgehammer blow.

Again, perhaps the Office of Juvenile Justice and Delinquency did not know itself at the time, but my standpoint, I consider it bad faith that as late as February and March, a revised plan was put in, submitted, approved by the office, approved by the board of trustees.

I have taken over as Acting President as of April 1, and we are cracking away, and we have a communications vice president, a vice president for local development, traveling, forming these partnerships, getting going and also raised with the people on staff—look, the grant is coming up, what is our budget, how much is left over, how much money do we have for program?

Product, we need product, and that was local partnerships. How much money was available? If the partnership had shown progress, there would be another half million dollars at the end of the grant period, and we knew there had to be submission of another grant for continuation.

And in April, May, the office needed 90 days to have the continuation grant. I asked staff to get that continuation grant, but I kept getting, no, you don't need it right now.

I was a little naive bungler going on, I should have asked, why don't you want a continuation request for a grant.

This is my first experience with a grant. Next time it happens to me, I am going to get that request in for a continuation and let them say we will do it or we won't do it. They waited until June 1, and it is all over, middle of June, so in effect, my impression is, kind of a tentative decision had been made there was going to be no continuation of the grant as early as April, when I was in the process of trying to get the requests in.

Mr. **Kildee.** Mr. Tauke, I will defer to you now for some questions.

Mr. **Tauke.** Amazing story. Let's start, who was to recruit the leadership? The chairman of the board? Who was recruiting the chairman of the Board, this guy who was going to come on board, and who was responsible for getting somebody after he turned you down?

Mr. **Eaton.** The time at which it became most active, this was being conducted by the interim chairman, Bob Baldwin. There were communications with several other people on the board, and there were communications to the National Executive Service Corps, had been assisting us.

Mainly, it was being carried out by the interim chairman.

Mr. **Tauke.** It was being done by the partnership, no involvement by the Justice Department?

Mr. **Eaton.** There was some communication.

Mr. **Keker.** I am not coming on board in July 1985, the picture is presented to me, come on board, Keker, there were other consultants, three others, one in fundraising, one in operations, another one in program, who is running this railroad?

OK, there is a designated president, and we have—I am getting this from the office, right down here on Indiana Avenue, and God is going to come on board in 2, 3 weeks.

Mr. **Tauke.** Who told you that God was coming on board in 3 weeks?

Mr. **Keker.** The Administrator of the Office of Juvenile Justice and Delinquency.

Mr. **Tauke.** Was he recruiting him then?

Mr. **Keker.** He raised the vision, Holy Grail out there.

Mr. **Tauke.** You were recruited by the Administrator of the Office of Juvenile——

Mr. **Keker.** Sure.

Mr. **Tauke.** Who asked you to take over as president?

Mr. **Keker.** We are talking about July.

Mr. **Tauke.** Later.

Mr. **Keker.** I was recruited as a consultant. On October 10, the organizational meeting of the board of trustees, they elected officers, I was elected senior vice president responsible for communications at that October 10 meeting.

Mr. **Tauke**. Didn't you then become President for 2 months?

Mr. **Keker**. I am a consultant, volunteer, part time, you know, specific responsibilities in communications areas.

Interim chairman was elected in January, waiting for Godot to arrive here. Many people saying he isn't going to show up. People thought he was going to show up prevailed, and we kept waiting.

Finally, an interim chairman was elected in January, and the President resigned for personal reasons, he got tired of this Mickey Mouse back and forth, visions about God was going to show up or not, and the interim chairman asked me to stay on as acting president until he could recruit a permanent president, at the same time, proceeding here to get a permanent chairman.

Mr. **Tauke**. Was the recruitment of leadership by the board or by the Office of Juvenile Justice?

Mr. **Keker**. The leadership for the partnership was the responsibility of the board.

Mr. **Tauke**. OK.

Mr. **Keker**. Nonprofit corporation, the trustees, officers had all the responsibilities of any corporation. It was their responsibility, if anything where they erred, looking back, was in deferring too much to—you know, we have people here saying we would have strong oversight, I would manage the hell out of it.

If you have a different organization, you can manage the hell out of it, but if you got a private corporation over here that also gets to be the private corporation, the trustees have responsibility and they can say, look, we got this agreement, cut it off, this is the way we are going to do it, getting our leadership, do it this way, and share this cooperation, but there can't be this interference, like any, whether public or private corporation, having an outside agency, a supplier, customer, so to speak.

Mr. **Tauke**. One thing I don't understand is, listening to the history that you outline, Mr. Eaton, there was no government involvement anticipated initially.

Then, of course, when the Government involvement came, apparently everything revolved around the Government involvement and the continuation of the program, it was impossible without Government involvement.

Whose idea was it to seek Government involvement in the first place?

Mr. **Eaton**. I am not sure that I can place that. At that point, there was not an organization, per se. We were working on articles of incorporation, bylaws. It just sort of evolved.

Mr. **Tauke**. Who wrote the application? Somebody had to write the application for the grant?

Mr. **Eaton**. The application largely was prepared by a consultant mentioned before.

Mr. **Tauke**. Was the consultant hired by the board or hired by the Office of Juvenile Justice?

Mr. **Eaton**. The Board didn't exist at that time.

Mr. **Tauke**. Who got the consultant to prepare the grant?

Mr. **Eaton**. I am not sure. The arrangement must have been made. By that time, also, the future President was here, too, and again selected in a similar fashion.

Mr. **Tauke**. Who paid for the consultant who wrote the grant?

Mr. **Eaton**. I am not aware, unless it was the payment paid to them after the partnership started.

Mr. **Tauke**. Do you think we have a situation here where the consultant who wrote the grant was paid for with the money in the grant?

Mr. **Eaton**. I am not sure.

Mr. **Kildee**. On that, the $3,900 fee which was disallowed, was that the payment to the consultant for writing the grant?

Mr. **Eaton**. That must be it.

Mr. **Tauke**. In any event, you as a member of the board did not initiate the application for the grant and didn't know that the grant was being sought.

Mr. **Eaton**. No; I knew. I was aware, and I was involved in some discussions about it, so it wasn't a surprise, although I was not a member of the board at that time, because the board had not yet been formed, so we didn't really have a board at that point.

Mr. **Tauke**. Was the grant awarded before the board was formed?

Mr. **Eaton**. The articles of incorporation, and so forth, were filed at that time, but the first operating board was really—I think it had its organizational meeting at our kickoff meeting on the 11th of October, which was within a day or so, at the time the—well, there was a technical structure.

There were three individuals who filed the articles of incorporation and served as an interim board. The articles called for that group of three initial people to appoint the first operating board.

We received nominations from a nominating committee, so they had been appointed but they had not met and had not been in any fashion involved, except the new that had been involved for other reasons.

Mr. **Tauke**. You indicated, and I don't mean to play word games with you, but you indicated one of the reasons why fund raising was put off was because you wanted to be on solid ground before approaching the private sector.

Did anybody ever think you ought to be on solid ground before approaching the public sector, the taxpayers, do you have any observations about that as a taxpayer, not as a subsequent member of the board?

Mr. **Eaton**. Yes; I do, and that issue was a matter of considerable discussion among many of us. A decision to go ahead and concur with the preparation of a grant proposal was not made as an easy one, because we recognized that we did not have an ongoing organization.

We did not have our leadership fully implanted. We finally agreed to do that, or were willing to do that, based on the supposition on the hope that the involvement of the Justice Department and the award of a grant could get us to the point that we were solvent.

Virtually everybody's involvement at this point was purely voluntary and trying to work this in between their other full-time jobs and duties. It was not an issue that was not taken seriously. Perhaps it was a calculated risk that turned out to be a poor one.

We knew a lot of things could happen, and we were hoping that the grant and the close involvement with the Justice Department would be helpful and not lead to the strive that we eventually experienced.

Mr. **Tauke**. This is kind of a fundamental question, but you talked about being out in the trenches and local partnerships, all of that, I am having a little difficulty envisioning exactly what the local partnerships were supposed to do.

Mr. **Keker**. The local partnerships were to visit a community, usually somebody invited them or there was a situation that depended—our experience, communities all the way from Dumpsville operating fat and happy without any kind of infrastructure within the city itself, and other communities had already had the equivalent of a local partnership, and in every community there were any number of organizations, there are dozens of organizations, public, private, all the rest, and in some communications there were pretty well organized in an informal kind of network, and in others they operated independently.

The prime objective was, one, look, let us get together, you got a prominent business person in the community to call a meeting, business, mayor, and in some communities, by virtue of calling that meeting and having all these groups come together, as the heightened awareness, to present the program, what you could get from the national partnership would be media attention, material, no funding, and you got to do it locally, and all we do is provide programs, replications, the kind of things that other organizations had, although they had it, there was a great deal of information to be gotten, but a lot was written in Ukrainian and had to be translated into English, from a communications problem, local.

It happened to Mobile, and we were well on our way in several other cities where one, the advantage to the local community was that they had a counsel of sorts, that they could come up with an annual plan, an annual fund-giving plan, equivalent of a United Way, and instead of each one of these groups beating on the local leading manufacturer for funds for that particular program, that they could come up with a kind of a grand plan to educate.

Drug abuse now among youth, school administrators, that they could have a concerted grand plan, do their own thing without any specific direction, but at least make their effort more efficient and perhaps more productive.

Now, that is on the fund-raising side. The media materials and kinds of things that are available, you were talking about networking here in Washington, but on the media side again each one of these organizations—we were prepared to go to each one of these local communities and try to get these people and in effect come up with a media plan that you could go to the TV stations that everybody would get their shot and you would stick it to the media and newspapers so that they could also be productive in their media campaign on this problem.

So that was the basic purpose of the partnership.

Mr. **Tauke**. This is my last question; there are many we could ask.

Was there any coordination with any other agency of the Federal Government? Did you have communication with other agencies that are involved?

Mr. **Keker.** Oh, yes—ADAMHA, they were on the board, NIH and many of the groups—as a matter of fact, there was a committee of the partnership which had all the representatives of the Federal and State agencies that were addressing this program.

Mr. **Tauke.** Was there a representative of the Government on your board outside of the Speaker and Bob Dole and Nancy Reagan?

Mr. **Keker.** No. There were some State directors—State government representatives.

Mr. **Eaton.** There was clearly no restriction against that at least as far as the partnership was concerned. I think some Federal officials sought counsel and so forth, and I then determined it would not necessarily be appropriate for Federal officials to serve on the board of trustees of a non-profit corporation.

Mr. **Tauke.** The national partnerships—what happened to those local partnerships that were initiated?

Mr. **Keker.** They will probably continue.

Mr. **Tauke.** Have you heard anything from them since?

Mr. **Keker.** I haven't, no.

Mr. **Tauke.** Thank you, Mr. Chairman.

Mr. **Kildee.** Thank you, Tom.

It is not clear to me where the concept of the national partnership was born, whether it was born in Government or out of Government.

In trying to follow the trail, we find this chronology: In October and November 1984, the OJJDP sponsored three meetings to explore the feasibility of a public/private drug initiative. Then, January 28 to 31, 1985, the OJJDP sponsored a meeting in Williamsburg, VA, and this apparently is the point where the actual partnership concept was formulated.

But it appears that some expectations and some planning had already taken place, because ASPEN Systems had already developed for the meeting the national partnership's logo, their graphics and background material and ASPEN works for the OJJDP.

Was this a private sector initiative or was this Government saying, we got an idea for you and if you accept it, we will give you some money.

Mr. **Eaton.** I would probably ask the same questions, although if you accept that, we will get you some money was not in that equation early at all.

Mr. **Kildee.** But they had been courting you a bit.

Mr. **Eaton.** I think, Mr. Chairman, that as many other concepts that are good ones, when there is an opportunity for people to say it is a good concept, they just start saying it is a good concept. The Justice Department clearly received an enthusiastic response to their initial three meetings and that is, I trust, when they decided to proceed with scheduling the Williamsburg meeting.

My opinion was asked, should we try to schedule a meeting where all the groups could get together. I concurred that it would be a good idea and I think many others did. I don't know who gave birth to it. When it began to be discussed, it was popular. Who said it first is very hard to tell.

Many of us have worked in other ways to try to develop coalitions of national groups dealing with this problem, so that idea has always been a popular one and we have always favored it.

Mr. **Kildee**. Mr. Petri?

Mr. **Petri**. I guess I have two questions.

One, did you ever form a partnership here in Washington in the course of all this, a local partnership?

Mr. **Keker**. We were working with one. It was in the process of being formed, yes.

Mr. **Petri**. But it never was?

Mr. **Keker**. There was the equivalent of one here already, the Federal City Council and groups in Washington were pretty well organized in this area.

Mr. **Petri**. In our State, the Federal Government managed to hammer us down to 21 for the drinking age and it is 18 in the District and kids are bused into D.C. on weekends by the bars. So it seems well organized. It seems to be on a profitmaking basis.

Mr. **Keker**. Washington and Baltimore and the State of Maryland, local partnerships were in the process of developing at the time.

Mr. **Petri**. We are not supposed to be running things. We are supposed to set policy and provide funds.

Do you have advice for anything we should be doing in Congress or in this committee to avoid frittering away money like this in the future?

Mr. **Keker**. I have one. I know that the initial concept included among other things when I was recruited in the summer of 1985 that there was a grant of $1 million available to the partnership for this particular program, ambitious program, but again in terms of what it would take to do the program, to execute and implement what was being envisioned, that even at that time the partnership, the people that came on board had as a goal to raise at least $5 million from the private sector within the year to pursue the objectives of the partnership.

A million dollars, everyone knew, wasn't going to go very far in accomplishing the objective. You had to have a matching equivalent, another million and a half during the first 9 months of the year.

To be involved in a team effort on $1 or $2 million, I certainly didn't want to bother with it.

My answer is, if I were doing—I was a government administrator, I would say, "Look, we are giving you a million and a half, you come up with a million and a half in the next 12 months or spend your money as you raise; we will give you $100,000 a month as you raise $100,000."

Mr. **Petri**. You think we should appropriate more money up front?

Mr. **Keker**. Up front and administer it.

Mr. **Petri**. Our job is not to administer it.

Does anyone else have ideas besides providing money to avoid this thing in the future?

Mr. **Butynski**. I would reiterate some of the recommendations made in my original testimony. It seems to me if you are going into an area as far as I know is not the primary focus of the Office of

Juvenile Justice and Delinquency Prevention that you might have that agency coordinate directly with the agency most responsible for working with alcohol and drug problems, ADAMHA.

So in terms of future grants they might consider in this area, it would be well to foster joint discussions, joint planning, joint funding of proposals. It would bring in the expertise from the alcohol and drug side.

Mr. EATON. I have a suggestion.

Mr. Chairman, you made mention early in the hearings that the Federal Government is not to form nonprofit corporations without the consent of the Congress or without an affirmative act on the part of the Congress. Perhaps at maybe a less formal level, when a government agency is intending to provide a grant to a new corporation or in a circumstance where, as you pointed out very fluently, it is hard to tell who is forming what here in this kind of thing. But I still think collaboration is very important.

Perhaps there needs to be a way to involve appropriate oversight committees of the Congress when a Federal agency is considering taking such a step so that everybody who potentially will be involved and has a stake in this can look at it on a prior basis.

I have a notion that had more people looked at some of this early that probably it still would have happened, but maybe some of the problems that we experienced would have been predicted and we perhaps could have built in some protections about.

Mr. KILDEE. Thank you very much, Tom.

A question to Dr. Butynski. Earlier this year a trade journal asserted that the national partnership had not established credibility with the alcohol and drug abuse prevention community.

Would you agree with that statement?

Mr. BUTYNSKI. I think I would agree with the statement in terms of with all parts of the alcohol and drug community. I think certainly with some parts of the community it had reasonable credibility, there were at least a couple board members, in fact, a number of board members with some alcohol and drug experience.

Other people in the alcohol and drug field felt it did not have credibility, so I think in reality there was a division within the partnership.

Mr. KILDEE. We have a vote. I would like to ask if I could one more question, directed to you, Dr. Butynski. We learn from the past, and we are trying to learn from this to make things work better in the future.

If the Justice Department, were to attempt another program, to draw together various elements in a partnership-type program or coalition what would you recommend we do differently?

Mr. BUTYNSKI. I think it would be best clearly if there were a clear grant application to be submitted that everyone had the same expectations in terms of what would be done, that the objectives were clearly defined, timeframes were clearly defined and responsibilities were clearly defined among staff and board members and then the granting agency could make the determination with some feeling that someone was taking responsibility.

I think clearly here in some instances that did not happen. As far as I know, the grant had not been approved by the board at the time that it was submitted. That seems to me a very major problem. I would think if a grant is approved by the board of trustees of whatever corporation, they then assume responsibility and will, in fact, see that it is carried out.

The other comment I will make is it might be well to ensure, in fact, somehow the kind of reasonable contribution from the private sector in that at least as far as I can determine you had a lot of Federal money, a lot of good names from both the Federal and national level and the private sector, but as pointed out earlier, the private sector never put in any substantial moneys and if that is the clear intent or expectation, then possibly some of that should be required upfront.

Mr. **Kildee**. Mr. Eaton, would you like to summarize briefly?

Mr. **Eaton**. Two points.

I would suggest that an undertaking like this, that any funding be provided on a phase basis, not let the big expenditures start until the planning is solid; to require solid leadership before the expenditure of significant money and become involved as a concurrer in the selection of leadership but not to control the selection of staff or board people; to be involved in a supporting way and concur, but not to get so close as to try to control the effort.

Mr. **Kildee**. Mr. Keker.

Mr. **Keker**. I think they have stated some good suggestions.

Mr. **Kildee**. That suggestion you made earlier was corroborated by Dr. Butynski that there be a requirement for matching.

I thank you. We are here to try to serve the kids of this country in this area and to spend the taxpayers' dollars wisely. You have been very helpful to the committee this morning and we appreciate that.

I would like to call attention to a friend of this committee and a friend of children of this country, Marion Mattingly, the Washington representative of the State advisory groups.

We appreciate your being here, Marion.

Thank you again for your testimony this morning, and we stand adjourned.

[Whereupon, at 12:22 p.m., the subcommittee adjourned.]

[Additional information included in appendix.]

APPENDIX

MAJORITY MEMBERS
DALE E. KILDEE, MICHIGAN, CHAIRMAN
TERRY L. BRUCE, ILLINOIS
CARL C. PERKINS, KENTUCKY
DENNIS E. ECKART, OHIO
MAJOR R. OWENS, NEW YORK
AUGUSTUS F. HAWKINS, CALIFORNIA, EX OFFICIO

[illegible]

SUSAN A. WILHELM, STAFF DIRECTOR

MINORITY MEMBERS
THOMAS J. TAUKE, IOWA
E. THOMAS COLEMAN, MISSOURI
THOMAS E. PETRI, WISCONSIN
JAMES M. JEFFORDS, VERMONT, EX OFFICIO

COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
402 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515

SUBCOMMITTEE ON HUMAN RESOURCES

October 17, 1986

Mr. Verne L. Speirs
Acting Administrator
Office of Juvenile Justice and
Delinquency Prevention
Department of Justice
Washington, D.C. 20531

Dear Mr. Speirs:

Thank you for your testimony at the Subcommittee's September 19, 1986 oversight hearing on the National Partnership to Prevent Drug and Alcohol Abuse. In order to further complete the record and to satisfy the requests for information made by Congressman Tauke and myself during the hearing, I would appreciate your providing the following material:

- the name of the private source which you indicated paid for the preparation of the National Partnership's grant application;
- the details of all Aspen Systems Corporation tasks and costs relating to the National Partnership, beginning with the January 1985 meeting in Williamsburg;
- a detailed breakdown of the types and amounts of National Partnership expenses incurred under the federal grant;
- copies of vitae and any other information used by the Office to determine that the peer reviewers were experts in the field of drug and alcohol abuse prevention; and
- copies of the documents which specifically show that the peer reviewers found the National Partnership's grant application to be of outstanding merit, as well as copies of the proposal review criteria from the Office's Peer Review Manual and from the applicable regulations.

Finally, in discussing the fact that the grant award was backdated to cover "some pre-agreed-upon costs," I mentioned during the hearing that such an arrangement suggests that assurances were given to the National Partnership that the grant award would be forthcoming. Is this the case, and if so, who gave these assurances?

Your cooperation in providing this information is greatly appreciated. Both this letter and your response will be included in the printed hearing record.

Sincerely,

Dale E. Kildee
Chairman

jm

U.S. Department of Justice

Office of Juvenile Justice and
Delinquency Prevention

Washington, D.C. 20531

31 OCT 1986

The Honorable Dale E. Kildee
Chairman
Subcommittee on Human Resources
Committee on Education and Labor
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter requesting information regarding the National Partnership to Prevent Drug and Alcohol Abuse Among Youth to be included in the record of the hearing on this subject.

The following materials are enclosed: information concerning the work of Aspen Systems related to the Partnership; copies of documents regarding the peer review of the Partnership application; minutes from Board of Directors meetings; a memorandum from the Office of General Counsel about the liability of the Partnership directors; and a listing of Partnership expenditures up to June 30, 1986.

We have been unable to trace the source of the private funds that paid for preparation of the Partnership's application. However, we understand this money was provided either by the Partnership president, Mr. Rex Tompkins, or by the Miller Brewing Company. Inasmuch as Federal grant funds were not used, we have no records indicating the source of the payment.

In addition, in signing the assistance award, former OJJDP Administrator Alfred Regnery approved the expenditure of funds by the Partnership for project costs incurred prior to the date of the grant award. I am enclosing a memorandum provided to the OJJDP project monitor concerning this subject. The date of the award to the Partnership was October 10, 1985. However, in order to cover the costs incurred in carrying out approved award activities commenced between August 1 and October 10, the date of the start of the project period was established as August 1, 1985. Had OJJDP wished to do so, it could have provided a full 12-month project period beginning October 10 and approved costs incurred between August 1 and October 10 as "preagreement costs." Either action is an allowable assistance award procedure.

I trust this information will prove helpful to the Subcommittee. Please do not hesitate to contact me if I can be of additional assistance in the Subcommittee's inquiry into this matter.

Sincerely,

Verne L. Speirs
Acting Administrator

Enclosures

National Partnership
to Prevent Drug and Alcohol Abuse Among Youth
1110 Vermont Avenue, NW, Suite 428
Washington, D.C. 20005
Telephone 202/429-2940

MEMO

TO: Frank Porpotage
FROM: Alexandra W. Rollins AWR
DATE: 25 September 1986

RE: Expenses incurred by the National Partnership prior to October 1, 1985 : $12,079.91

The total amount paid out for goods and services prior to October 1, 1985 is $12,079.91. This number includes work and expenses for the 4 consultants and does not break out whether the expenses were charged to the grant or private accounts.

Further, it does not take into consideration work done by either Mr. Thompkins or Ms. Goodwin, but paid for subsequent to October 1, 1985. Those records are not easy to find and computations would have to be done on a per diem basis. Equipment or work contracted for prior to October 1 is not included either.

NATIONAL PARTNERSHIP TO PREVENT DRUG AND ALCOHOL ABUSE
FINANCIAL REPORT FOR PERIOD ENDING JUNE 1986
EXPENDITURES TO DATE

CATEGORY	AMOUNT
Personnel	$284,545
Fringe benefits	47,519
Travel	40,063
Equipment	13,110
Supplies	22,593
Consulting/Contractual	188,831
Other	141,570
Taxes, interest expense, insurance	10,667
Total	$748,898

Aspen Systems Corporation

MEMORANDUM

TO: Terry Donahue **DATE:** September 25, 1986

FROM: Richard Rosenthal **SUBJECT:** Support to the National Partnership

At your request and as a result of my conversations with Roberta Dorn I am providing the attached breakdown of costs incurred by Aspen Systems Corporation in support of OJJDP's National Partnership initiative. As you requested, these costs are categorized according to specific tasks or functions performed by Aspen. In addition, the costs have been identified for the periods prior to, and after January 5, 1985, as requested by you.

I have also attached for your assistance an annotated list of all task orders/ relevant correspondence issued by OJJDP authorizing Aspen to perform the activities associated with the National Partnership.

If I can be of further assistance please do not hesitate to contact me.

pc: Roberta Dorn, OJJDP

ATTACHMENT A

Summary of Expenditures for National Partnership Related Tasks

		COST (pre 1/4/85)*	COST (post 1/4/85)
I.	Aspen Labor	$20,872	$53,713
II.	Other Direct Costs		
	1. Travel, Aspen Staff	1,649	1,788
	2. Postage/Expressage	1,182	2,147
	3. Consultants/Fees	28,296	36,752
	4. Consultants/Expenses	15,408	17,252
	5. "Hardship" Travel/Expenses	4,219	20,971
	6. Graphics/Audiovisual	20,934	16,752
	7. Conference/Hotel/Meeting Expenses	17,678	84,718
	8. Word Processing	1,391	3,499
	TOTALS:	$111,629	$237,592

*Previously documented in January 15, 1985 letter to A. Regnery from R. Rosenthal

ATTACHMENT B

Annotated List of Task Orders/Relevant Correspondance Authorizing National Partnership Activities

1. 12/4/84, Memo, R. Dorn to R. Rosenthal: Use of S. Jacobs, Consultant
2. 12/5/84, Memo, R. Dorn to R. Rosenthal: "Hardship" Travel Authorization
3. 12/14/84, Memo, R. Dorn to E. Grigg, cc. R. Rosenthal: Use of J. Hawkins, Consultant
4. 1/9/85, Memo, R. Dorn to R. Rosenthal: Revised "Hardship" Travel Instruction
5. 1/14/85, Task Order V., R. Dorn through J. Wootton to R. Rosenthal: Use of Expert Consultants, J.D. Hawkins and others
6. 1/15/85, Task Order VI., R. Dorn to R. Rosenthal: Provide Facilitators/Planners for Williamsburg Meeting
7. 1/15/85, Task Order VII., R. Dorn to R. Rosenthal: Use of reporter for proceedings
8. 2/12/85, Memo, R. Dorn through A. Regnery to R. Rosenthal: Curtailment of consultant S. Jacobs', activities
9. 2/13/85, Memo, R. Dorn through A. Regnery to R. Rosenthal: Detailed description of consultant S. Jacobs' assignment
10. 2/26/85, Task Order XI., R. Dorn to R. Rosenthal: Use of Professional Facilitator for Steering Committee
11. 5/16/85, Task Order 14, R. Dorn through J. Wootton to R. Rosenthal: Use of R. Kramer, Consultant
12. 5/29/85, Task Order 17, R. Dorn through J. Wootton to R. Rosenthal: NCJRS Responsibilities for July Meeting
13. 6/17/85, Amendment to TO #14, R. Dorn to R. Rosenthal: Use of R. Kramer, Consultant
14. 9/6/85, Task Order 34, R. Dorn to M. Levine: Use of Garrett O'Keefe, Consultant
15. 9/9/85, Task Order 35, R. Dorn to M. Levine: Use of R. Thomkins, D. Gerrish, S. Keker, R. Coursen, C. Stover, Technical Assistance Providers
16. 9/24/85, Task Order 38, R. Dorn through J. Wootton to M. Levine: Use of Event Planner and Public Relations Firms for October 10, 1985 Meeting
17. 10/7/85, Task Order 41, R. Dorn to M. Levine: Provide Consultant Comment on Partnership Proposal
18. 10/15/85, Task Order 42, R. Dorn to M. Levine: Provide Consultant Comment on Partnership Proposal
19. 1/13/86, Task Order 66 (retroactive), R. Dorn to M. Levine: Use of P. Schneider for 1-day planning meeting
20. 3/26/86, Task Order 74 (retroactive to 9/23/85), R. Dorn through J. Wootton through A. Regnery to M. Levine: Use of B. Certner, Consultant

U.S. Department of Justice

Office of Juvenile Justice and
Delinquency Prevention

Washington, D.C. 20531

CERTIFICATION

Pursuant to Section 225(d)(1)(B)(i), I have determined, through peer review, that the proposed program, The National Partnership to Prevent Drug and Alcohol Abuse, is of such outstanding merit that the award of the grant without competition is justified.

Alfred S. Regnery
Alfred S. Regnery
Administrator

Oct. 9, 1985

Memorandum

Subject

Peer Review Findings for the National Partnership Proposal

Date

9 OCT 1985

To

Alfred S. Regnery, Administrator, OJJDP
'ames Wootton, Deputy Administrator
Terrance Donahue, Acting Director, SED
Douglas Dodge, Assistant Director

From

F.M. Porpotage, II Frank
Program Manager, SED

Pursuant to Section 225(a)(1)(B)(i) of the Act and the accompaning regulation of 28 CFR Part 34, a peer review was conducted on October 8 - 9, 1985 on the National Partnership Proposal. Two of the individuals initially selected to participate in the peer review were dismissed. Dr. William Butynski excused himself due to his feelings of an appearance of a "conflict of interest." Ms. Carolyn Burns was asked to resign due to her professional ties to one member of the Board of Trustees of the National Partnership.

A three-member board was subsequently convened and included:

Mr. Carl Hampton, Criminal Justice Coordinator, National Institute of Drug Abuse, Rockville, Maryland;

Mr. Thomas R. Ascik, Attorney at Law, Arlington, Virginia;

Mr. Patrick McGuigan, Director, Judicial Reform Project, The Institute for Government and Politics, Washington, D.C.

The written statement and findings of all three individuals are attached. All three found "the program outstanding and award is justified without competition and suggestions were made for improving the application." Accordingly, I shall make their comments known to the applicant if award is approved.

Attachments

On this date I telephonically contacted Mr Cal Hampton. Inasmuch as the criteria for determining merit in these proposals changed from Oct 8 TO Oct 9 I asked Mr Hampton to rate the application based upon the 3 possible findings. He chose option #2.

To: Frank Porpotage, OJJDP

From : Bill Butynski, NASADAD

Date : 10/6/85

Topic : Review of the Proposal prepared by
Peter Schneider for the National
Partnership

Having read and reread the OJJDP Peer Review Manual with regard to perceived potential or actual conflict of interest I feel that I must withdraw as a reviewer for this particular application. Although I do not have a close or otherwise potentially conflictual relationship with the author, Peter Schneider, my involvement with the National Partnership overall has been so close that others could assume that there exists a conflict of interest. Therefore, I wish to withdraw my name as a reviewer. I hope that this will not prejudice your review of the application in any way.

THOMAS R. ASCIK
ATTORNEY AT LAW
1611 NORTH KENT STREET
SUITE 805
ARLINGTON VIRGINIA 22209

(703) 524-1505

WORK HISTORY

PRESENT	Attorney-at-law, solo practicioner, Arlington, Virginia. Executive Director, The Clearinghouse on Educational Choice, Arlington, Virginia.
1982-1985	Senior Research Associate, National Institute of Education, U.S. Department of Education. In turn: Special Assistant to the Director, Director of Planning and Program Development, and Senior Research Associate, Program on Law and Public Management, Washington, D.C.
1981-1982	Special Assistant to the Executive Secretary, Office of the Secretary, U.S. Department of Education, Washington, D.C.
1977-1981	Public Policy Analyst, The Heritage Foundation, Washington, D.C.
1977	Freelance writer and editor, Washington, D.C.
1976-1977	English teacher, Gonzaga College High School, Washington, D.C.
1973-1976	Infantry officer, U.S. Marine Corps.
1973	Apprentice reporter, The Washington Star, Washington, D.C.
1972	Assistant librarian, Anne Arundel County Public Libraries, Annapolis,

EDUCATION

1983	J.D., George Mason University School of Law, Arlington, Virginia.
1976	Six credits, Georgetown University Graduate School of English.
1974	Marine Corps Infantry Officer School.
1973	Marine Corps Officer Candidate School.
1972	B.A., St. John's College, Annapolis, Maryland.

MEMBERSHIPS

Virginia State Bar
Educational Excellence Network
American Educational Research Association

PUBLICATIONS

1985

"School Desegregation and Black Achievement," American Education, forthcoming, August, 1985

1984

"Looking at Some Research on What Makes an Effective School," Blueprint for Educational Reform, Connaught Marshner, editor, Free Congress Research and Education Foundation.

"The Courts and Education," A New Agenda for Education, Eileen Gardner, editor, The Heritage Foundation.

1981

Studies for the Heritage Foundation:
The Reagan Block Grant Proposals and Congressional Revisions
Block Grants and Federalism: Decentralizing Decisions
Draft Registration: Congress, the Supreme Court, and the Separation of Powers

1980

Studies for the Heritage Foundation:
The Role of Campaign Contributions in the 1980 Senate Elections
Postponing Decisions: The Lameduck 96th Congress
Fair Housing Amendments: Collision Between Property Rights and Civil Rights
The Balanced Budget Amendment: An Economic and Constitutional Review
Congress and the Supreme Court: Court Jurisdiction and School Prayer
The Abortion Right: "A Constitutional Right of Unique Character"

1979

Studies for the Heritage Foundation:
Restricting Political Action Committees: H.R. 4970
The Anti-Busing Constitutional Amendment
Electoral College Reform
Taxpayer Financing of Elections: Government as a Special Interest
Affirmative Action in the Civil Service: The State of the Art
Restricting Political Action Committees: An Update
The Department of Education

1978
Studies for the Heritage Foundation:
Civil Service Reform and Government Reorganization
ERA Extension: Update on the Arguments
Tuition Tax Credits Proposals
District of Columbia Representation: "As Though It Were a State"
The Drug Regulation Reform Act
Airline Deregulation

1977
Studies for the Heritage Foundation:
The ERA: Is Seven Years Enough?
National Flood Insurance: The End of a Partnership?
Sunset Proposals: Can They Reform the Bureaucracy?

PUBLIC TESTIMONY

1981	Before the Subcommittee on the Constitution of the Judiciary Committee of the U.S. Senate, concerning Congress' power over the federal judiciary pursuant to Article III of the Constitution.
1979	Before the state legislatures of Kentucky and Alaska, concerning the proposed constitutional amendment providing for representation for the District of Columbia.
1978	Before the state legislatures of Pennsylvania and Ohio, concerning the proposed constitutional amendment providing for representation for the District of Columbia.

OCTOBER 9, 1985

REVIEW OF "A PROPOSAL FOR THE NATIONAL PARTNERSHIP TO PREVENT DRUG AND ALCOHOL ABUSE," SUBMITTED TO THE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION PROGRAMS, U.S. DEPARTMENT OF JUSTICE.

Reviewed by Thomas R. Ascik
Attorney at Law
1611 North Kent Street
Arlington, Virginia 22209
703-525-1505

Overall Evaluation

This proposal may well be an "outstanding opportunity to achieve the goals and objectives of the Juvenile Justice Act." A great deal of work has put in to round up an impressive list of people who have committed themselves to active involvement in the project. This list includes the President and the First Lady themselves. Certainly, the "visibility test" has been passed. This project will get public attention.

In addition, one of the stated purposes of the project, to find out what works and to be a resource for the replication of workable projects at other sites, is wisely conceived and may protect this project from the unsuccessful fate of numerous "top-down" interventions of the past.

The intergovernmental aspect of this project — its involvement of national, state, and local sources, — is another safeguard against failure. In addition, the private sector really dominates the public sector in this proposal. That is probably the only way something like this can succeed.

There are some deficiencies — probably correctable — that do, however, call into question how good this "opportunity" really is. In brief, they are:

1) There is a very noticeable lack of church involvement in the project. I saw mention of only two mentions of participation by churches. Is it presumed that priests, rabbais, and ministers have nothing to say about these problems? In addition, don't churches conduct their own prevention programs these days?

2) There may be less than meets the eye in the media involvement in this project. Are they agreeing to just run public service announcements, or are they agreeing to seriously consider whether their own programs and ads actually contribute to the problem?

3) It is not obvious that there is a "need for national coordination" to attack this problem. This is merely asserted but not proved. It could have been proved by showing how local efforts have failed or by showing that the source of the problem is national (the national drug trade, for example). Is a national figure like the President more effective in exhortig kids to remain free from drugs — or is a kid's father, priest, or teacher?

4) The personnel is heavily from the health community and lightly from the school community. This should be adjusted.

5) The conception of the project is entirely from an empirical point of view. The section on theory is almost entirely devoid of theory. It is almost exclusively descriptive. Is there

no theoretical work in theis field? Or is this proposal deficient in presenting it? Presumably, since this project aims to prevent these behaviors, some theoretical work is necessary.

6) It is clear that the "experts," the empirical scientists and the health workers, are going to dominate the actual substance of what programs are eventually adopted by the project. The private sector is likely to have the job to sell the adopted programs. The proposal as a whole is short on what substantive programs will be adopted. It is difficult to assess the opportunity presented by this proposal when so little of the eventual substance is known.

Tibor R. [illegible]

This program is outstanding and suggestions are made for improving the application.

Tibor R. [illegible]

Patrick B. McGuigan is Co-Editor of Criminal Justice Reform: A Blueprint. Mr. McGuigan is Director of the Judicial Reform Project of The Institute for Government and Politics , Free Congress Foundation. In addition to four books, previously published in the general subject area of crime and delinquency, he has a book forthcoming on the topic: Crime and Punishment in Modern America, of which he is co-editor. He holds the B.A. degree in History, and a M.A. in History in Medieval History.

Mr. McGuigan is on the Board of Advisors for RESTTA, and a recognized expert in the area of juvenile justice as related to minority issues.

October 9, 1985

MEMORANDUM

From: Patrick B. McGuigan Patrick B. McGuig
Co-Director
Institute for Government and Politics

To: Frank Porpotage, Office of Juvenile Justice and Delinquency Prevention

Re: National Partnership to Prevent Alcohol and Drug Abuse

I have devoted substantial time and energy to a peer review of the proposed grant. I believe this program offers a unique and outstanding opportunity to achieve the goals and objectives of the Juvenile Justice Act. The incidence of drug-related crime and social problems is well-documented not only in this grant, but also in the research documents I peruse regularly in my work. The program concept is sound and sufficiently specific that I am confident it will promote the primary goal of reducing drug and alcohol abuse among young people.

The mechanism described in this grant for carrying out the program concept is particularly viable. Further, the ideas described here are exciting in that they build on effective community-based models.

To summarize my views after careful analysis of the proposal:

* the statement of the problem is pointed and determined, yet not infused with the panic-stricken quality so frequently encountered in the literature focusing on drug abuse prevention and education.

* the definition of objectives is clear and understandable. The objectives are quite focused and specific, with admirable restraint in the description of what is achievable given the resources and personnel desired by the applicant.

* the project design is perhaps the most outstanding portion of the application. Here is a "real world" program with imminently achievable objectives and a specific plan to move.

* the management structure is straightforward and dictated by the scope of the concept.

* given the experience and credibility of the consultants and professional staff (insofar as those are defined in this application), the organizational capability to move on this problem is apparent -- given sufficient resources and time to implement the concept.

* the costs described herein are entirely reasonable, given the reach and scope of the program required to implement the concept.

Of all the specific steps and programs described herein to achieve the program goals, I was most enthusiastic about the Town Meeting plan of action. These problems will only be resolved by free men and women acting in their own communities. The grant applicant appears to understand that solutions can not be "parachuted in" to local communities. Related to this, I have only one specific proposal for improving the application and the program concept: The national, state, anchor city and town/county partnerships -- and the various committees and working groups flowing therefrom -- might be most effective if a majority (certainly more than one-fourth) of the membership came from citizen and local-based organizations. Service providers and other professionals have a role to play, but a specific willingness to learn from local activists who are already tackling these problems will only strengthen the application -- and ultimately the National Partnership as a whole.

With these modest suggestions for improvement, I believe the program is oustanding. The award is justified without competition even in the absence of the suggested elevation of the role of citizen and community activists.

BIOGRAPHICAL DATA

Carl S. Hampton

Mr. Hampton is Criminal Justice Coordinator for the Prevention and Communications Branch of the the National Institute on Drug Abuse, within the Alcohol, Drug Abuse and Mental Health Administration in the Department of Health and Human Services.

A native of Chicago, Illinois, Mr. Hampton was graduated with a Bachelors degree from the University of Illinois, having majored in criminology and social problems. He received a Masters degree in Public Administration from the University of California in Los Angeles, specializing in correctionial administration. These academic credentials, combined with diversified work experience in all components of the criminal justice system, with the exception of law enforcement, (courts, institutions, probation and parole for juveniles and adults, males and females), has ranged from the south side of Chicago to East Los Angeles to Washington, covering 15 years, a the County, State and Federal level of Government. He has specialized in policy formulation, program development, planning and training for treatment and rehabilitation programs of offenders. He has been affiliated, as an adjunct faculty professor, with universities and colleges in the last ten years to include Pepperdine University in California, and the American University for Administration of Justice.

The highlights of his management and administrative assignments have included Criminal Justice Coordinator for the Special Action Offfice of Drug Abuse Prevention in the Executive Office of the President, Project Director for the Management Consultant Team to the Department of Labor Correctional Manpower Pre-Trial and Institutional Programs, Assistant Regional Administrator for the California Narcotics Treatment and Control Civil Commitment Program. His leadership in various community services have included Associate Director of the OEO CAP Agency in Los Angeles, Director of a neighborhood association in Watts, Manager of a complex of Governmental services in Venice, California, and group leader in a neighborhood center in Chicago. His primary case work interest has been with disadvantaged youth, alcoholic and drug offenders.

Mr. Hampton has authored and directed the development of many publications and is the holder of numerous awards from professional and civic groups ranging from The League of United Latin American Citizens in Venice to Letters of Commendation from the Executive Office of the President. He is a distinguished military candidate from Officer Candidate School and a former Captain in the United States Army Field Artillery with command exerience.

He has three children.

PEER REVIEW

of the

National Partnership to Prevent Drug and Alcohol Abuse

Application # 5-0367-7-NY

Name of Reviewer Carl Hampton

Date 10/8/85

Review Criteria

The application is to be reviewed based upon the extent it meets the following selection criteria: (1) the problem to be addressed by the project is clearly stated; (2) the objectives of the proposed project are clearly stated; (3) the intrinsic nature of the program's conceptual focus has merit; (4) the project design is sound and contains elements directly linked to the achievement of project objectives; (5) the project management structure is adequate to the successful conduct of the project; (6) organizational capability is demonstrated at a level sufficient to successfully support the project; and (7) budgeted costs are reasonable in comparison to the activities proposed to be undertaken.

Please make written comments on the attached pages on each review criteria. Numerical values have been assigned to each criteria. The values applied should be reflected in your written comments.

Name Carl Hampton

Application # __________

Statement of the Problem - 15 Points

The section of the proposal which sets forth a statement of the problem is an impressive compilation of current, up-to-date statistics which summarizes and describes the magnitude of the contemporary Drug and Alcohol problem ~~is~~ satisfactorily.

There are serious omissions, however, given the scope and difficulty of the ~~task~~ mission confronting the Partnerships:

First, this section does not address the ~~evolution and development of the~~ early beginnings of the Drug and Alcohol problem, the evolution or development of these problems through different eras or stages, different legal, social or cultural perspectives on the problem which make it so intractable for permanent or lasting change, or even ~~truly~~ how Prevention has come to enjoy a higher priority in Contemporary Society and is seen as having more (over)

Score 8

Existing potential, There is no explanation ~~This section~~ concerning why the areas were selected — family, schools, etc — or others omitted (the religious, etc)

Secondly, This section does not address ~~there does not try~~ ~~reflect any~~ the history of previous efforts to combat the Drug and Alcohol problem, the Countries past progress and problems or successes and failures, the interrelationships between Prevention, & Research, Intervention Treatment, etc.

Thirdly, this section does not address the main or primary problem confronting the Partnership — not the pervasive & widespread Drug & Alcohol problem but the apparent weaknesses or deficiencies in the ~~poor~~ many diverse efforts to attack it. The Problem for the Partnership is on a different level, not direct service but management, & coordination of all the Country's resources.

This section does not reflect an in-depth understanding or appreciation of what can be done, or should be done.

Name Carl Hampton

Application #

Definition of Objectives - 15 Points

There are several different objectives set forth in this proposal, all of which seem worthwhile and fundable but do not address the objectives of this procurement.

The Goals of the Partnerships, and the Objectives of the different Task Forces, ~~[illegible]~~ developed in previous workshops seem meaningful, and relevant, and provide a solid-Conceptual Framework for the Partnerships.

There are serious omissions however in the goals or objectives to be undertaken, and accom listed in this effort. Given the goals stated above, what are the goals or objectives of this phase stated in clear, precise terms, ~~and~~ seem ~~capable of~~ feasible and appropriate and capable of achievement. The only place they are addressed is in the narrative ~~for the~~ ~~budget~~ stated in generalities which do not lend themselves to measurement (pg. 4) ~~These~~

These statements ~~provide a~~ build on the conceptual framework, but taken by themselves, ~~[illegible]~~ have not been quantified, and are therefore diffi

Score 8

(cont'

to measure — There is need to translate these very important and worthwhile statements into concrete, measurable accomplishments.

~~which~~ This omission or deficiency is interrelated with a Management Plan which goes beyond Organizational Structure or Staffing patterns and lays out what will be done, where it will be done, how, why, and to what end. Without ~~the~~ Objectives of this kind it will be difficult to determine the impact of the National Partnership (or in Contractual terms, its success or failure).

Name Carl Hampton

Application # __________

Intrinsic Merit - 15 Points

In my considered judgment, this is by far the single most important element in this proposal - the vision of a National Partnership broadly representative of all the different segments of the Country, and mobilized to focus on one problem ~~[illegible]~~ among the Nation's youth. It is ~~[illegible]~~ apparent a mechanism, a forum of that nature does not currently exist, and is badly needed.

The Concept of a National Partnership is an impressive one, with unlimited inherent potential, and one which be of lasting and immeasurable value for Contemporary American Society.

Score 15

Name Carl Haughton

Application # ____________

Project Design - 15 Points

Given the Conceptual Framework, the
Organizational Structure, the general goals
and objectives set forth in all of which are
highly commendable this particular section
requires extensive improvement.
The single most glaring deficiency is the
process, or mechanism by which the wealth
of information in the Research and Theory will
be translated into the Activities of the
Partnership. That information is primarily for
Programs and Services which provide a direct
service - many of which are already operating,
with varying degrees of success, What process will
be used to assist programs in need of improvement
how will that be determined, who will provide
help is that a legitimate function of the Partner
ship. Assuming the Partnership will want to
incorporate that information or those appro
into new or future programs or services how
will that be done, by whom, etc.
Given the very impressive work already done by
the various groups, and task Forces how
well the Partnership attempt to implement (con

Score 6

these objectives, or relate them to ~~[illegible]~~ existing programs, or new ones.

These process(es), ~~[illegible]~~ form the main business of the Partnership; that is, managing, directing, coordinating, etc all of the many different diverse activities currently underway at the Federal State, or Local level and in either the Public, Private, ADM or Juvenile Justice sectors. This maze is an "Administrative Nightmare" for the Partnership to work through — ~~and a~~ offering the greatest challenge and opportunities. However, it is extremely difficult to discern how the Partnership relates to ~~the~~ that picture.

Project Design in terms of a clear concise Administrative or Managerial process to implement the Partnership's as envisioned is sorely missing.

It remains unclear how the vital Private Sector will participate in this process. (funds, expertise, limited tasks, etc).

Name Carl Haughton
Application #

Management Structure - 15 Points

The management structure is one of the most impressive features of the project, and in a sense, some of the broad goals stated in the proposal have already been accomplished: incorporation, a very prominent Board of Trustees, an impressive slate of proposed staff, and organizational units, etc.

While this element is very closely related to Organizational Capability, some ~~[illegible]~~ managerial concerns will be noted here:

First, there is a serious question of how the Program Coordinator, Project Manager, and Senior Consultants will relate to each other, and to the VP's. If the VP's have the credentials, work experience and prestige reflected here - perhaps the Senior Consultants could be used in other capacities. Otherwise the 2 positions invite role-confusion and ~~tot~~ consume Consultant skills which could be better used elsewhere.

Score 8

Secondly, the hierarchy of Partnerships

(National, State, Anchor City, Town & County, etc) seems ~~[illegible]~~ to be theoretically sound, but does not reflect an understanding of what units, organizations, of a Coordinating nature are already in existence which relate to these or similar activities in various stages of development.

Thirdly, the Management Structure does not reflect a Management Plan with concrete, quantifiable objectives for units, and organizations individual staff members, or Consultants. The Partnership has assembled an impressive cadre of different experts but it is difficult to discern what role each team member will play or what is the anticipated outcome or result. (beyond "anchor city" - or additional partnerships - generalities which could benefit from specificity.

Name Carl Hampton

Application # ______________

Organizational Capability - 15 Points

It is readily apparent that a lot of very Hard work has gone into the Partnership to help develop the Concept to the point where it is. It remains an interesting, challenging, and very profound vision. The Organizational Structure previously alluded to is very impressive.

What appears to ~~[illegible]~~ require serious work, closer scrutiny, and ~~[illegible]~~ clarity is the process, mechanism, ~~[illegible]~~ ~~[illegible]~~ in which the Vision, and the structure can be translated into reality. The Framework, the Philosophy, the structure but not the process.

A detailed, specific Management Plan to encompass policy objectives, procedural steps, staff deployment, different levels of objectives from program development to System Change, Capacity building, etc. needed (over)

Score 5

detailed coverage.

Without this element the Organization Capability cannot ~~to~~ [illegible] be realized.

Name Carl Hampton

Application # ____________

Reasonableness of Costs - 10 Points

The ~~[illegible]~~ role and function of various staff members set forth in the proposal, as indicated earlier, seem to combine a mix of skills required for some but not all of the activities envisioned in the proposal. The lack of specificity, and clarity regarding staff deployment, and staff activities would not normally be associated with costs. However, since this is largely a developmental effort, and staff or operational costs consume the largest share of funding it directly affect reasonableness of costs.

There is a serious question of whether the staff proposed are realistic in light of their ~~[illegible]~~ coordinating or facilitating responsibilities. This initiative unlike most others appears to be an effort to mobilize, coordinate, facilitate, expedite, etc existing agencies, ~~Governmental~~ units, cover,

Score 5

organizations and individuals many of whom are already an integral part of [illegible] Coordinating Councils, Inter-Agency groups, etc. and therefore do not require a direct service. Perhaps serious consideration should be given to deployment of its staff, and in a different manner, [illegible]

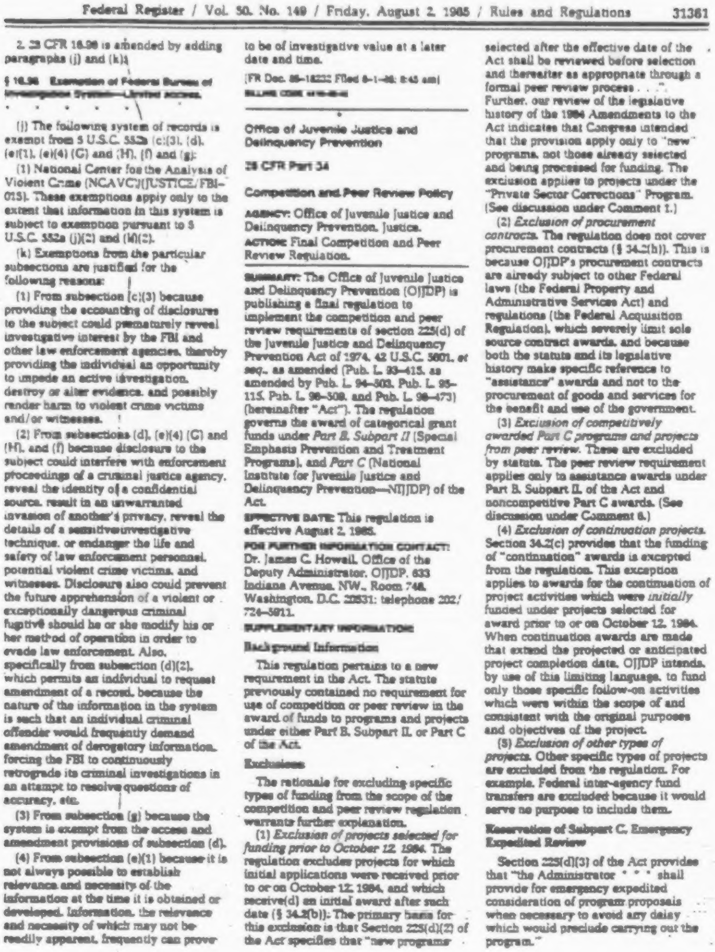
Other costs do not seem unreasonable.

Summary Statement

I continue to be very favorably impressed with the vision of the National Partnership, and strongly recommend the initiative be pursued. I wish to add, however, that the application I reviewed, while commendable in some respects, has serious deficiencies which should be considered ~~for~~ and improved upon.

APPENDIX A

REGULATION ON COMPETITION AND PEER REVIEW POLICY



2. 28 CFR 16.96 is amended by adding paragraphs (j) and (k):

§ 16.96 Exemption of Federal Bureau of Investigation Systems—Limited access.

* * * * *

(j) The following system of records is exempt from 5 U.S.C. 552a (c)(3), (d), (e)(1), (e)(4) (G) and (H), (f) and (g):

(1) National Center for the Analysis of Violent Crime (NCAVC)(JUSTICE/FBI-015). These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a (j)(2) and (k)(2).

(k) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because providing the accounting of disclosures to the subject could prematurely reveal investigative interest by the FBI and other law enforcement agencies, thereby providing the individual an opportunity to impede an active investigation, destroy or alter evidence, and possibly render harm to violent crime victims and/or witnesses.

(2) From subsections (d), (e)(4) (G) and (H), and (f) because disclosure to the subject could interfere with enforcement proceedings of a criminal justice agency, reveal the identity of a confidential source, result in an unwarranted invasion of another's privacy, reveal the details of a sensitive investigative technique, or endanger the life and safety of law enforcement personnel, potential violent crime victims, and witnesses. Disclosure also could prevent the future apprehension of a violent or exceptionally dangerous criminal fugitive should he or she modify his or her method of operation in order to evade law enforcement. Also, specifically from subsection (d)(2), which permits an individual to request amendment of a record, because the nature of the information in the system is such that an individual criminal offender would frequently demand amendment of derogatory information, forcing the FBI to continuously retrograde its criminal investigations in an attempt to resolve questions of accuracy, etc.

(3) From subsection (g) because the system is exempt from the access and amendment provisions of subsection (d).

(4) From subsection (e)(1) because it is not always possible to establish relevance and necessity of the information at the time it is obtained or developed. Information, the relevance and necessity of which may not be readily apparent, frequently can prove to be of investigative value at a later date and time.

[FR Doc. 85-18222 Filed 8-1-85; 8:45 am]

BILLING CODE [illegible]

Office of Juvenile Justice and Delinquency Prevention

28 CFR Part 34

Competition and Peer Review Policy

AGENCY: Office of Juvenile Justice and Delinquency Prevention, Justice.

ACTION: Final Competition and Peer Review Regulation.

SUMMARY: The Office of Juvenile Justice and Delinquency Prevention (OJJDP) is publishing a final regulation to implement the competition and peer review requirements of section 225(d) of the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. 5601, *et seq.*, as amended (Pub. L. 93-415, as amended by Pub. L. 94-503, Pub. L. 95-115, Pub. L. 96-509, and Pub. L. 98-473) (hereinafter "Act"). The regulation governs the award of categorical grant funds under *Part B, Subpart II* (Special Emphasis Prevention and Treatment Programs), and *Part C* (National Institute for Juvenile Justice and Delinquency Prevention—NIJJDP) of the Act.

EFFECTIVE DATE: This regulation is effective August 2, 1985.

FOR FURTHER INFORMATION CONTACT: Dr. James C. Howell, Office of the Deputy Administrator, OJJDP, 633 Indiana Avenue, NW., Room 748, Washington, D.C. 20531; telephone 202/724-5911.

SUPPLEMENTARY INFORMATION:

Background Information

This regulation pertains to a new requirement in the Act. The statute previously contained no requirement for use of competition or peer review in the award of funds to programs and projects under either Part B, Subpart II, or Part C of the Act.

Exclusions

The rationale for excluding specific types of funding from the scope of the competition and peer review regulation warrants further explanation.

(1) *Exclusion of projects selected for funding prior to October 12, 1984.* The regulation excludes projects for which initial applications were received prior to or on October 12, 1984, and which receive(d) an initial award after such date (§ 34.2(b)). The primary basis for this exclusion is that Section 225(d)(2) of the Act specifies that "new programs selected after the effective date of the Act shall be reviewed before selection and thereafter as appropriate through a formal peer review process . . .". Further, our review of the legislative history of the 1984 Amendments to the Act indicates that Congress intended that the provision apply only to "new" programs, not those already selected and being processed for funding. The exclusion applies to projects under the "Private Sector Corrections" Program. (See discussion under Comment 1.)

(2) *Exclusion of procurement contracts.* The regulation does not cover procurement contracts (§ 34.2(h)). This is because OJJDP's procurement contracts are already subject to other Federal laws (the Federal Property and Administrative Services Act) and regulations (the Federal Acquisition Regulation), which severely limit sole source contract awards, and because both the statute and its legislative history make specific reference to "assistance" awards and not to the procurement of goods and services for the benefit and use of the government.

(3) *Exclusion of competitively awarded Part C programs and projects from peer review.* These are excluded by statute. The peer review requirement applies only to assistance awards under Part B, Subpart II, of the Act and noncompetitive Part C awards. (See discussion under Comment 6.)

(4) *Exclusion of continuation projects.* Section 34.2(c) provides that the funding of "continuation" awards is excepted from the regulation. This exception applies to awards for the continuation of project activities which were *initially* funded under projects selected for award prior to or on October 12, 1984. When continuation awards are made that extend the projected or anticipated project completion date, OJJDP intends, by use of this limiting language, to fund only those specific follow-on activities which were within the scope of and consistent with the original purposes and objectives of the project.

(5) *Exclusion of other types of projects.* Other specific types of projects are excluded from the regulation. For example, Federal inter-agency fund transfers are excluded because it would serve no purpose to include them.

Reservation of Subpart C, Emergency Expedited Review

Section 225(d)(3) of the Act provides that "the Administrator * * * shall provide for emergency expedited consideration of program proposals when necessary to avoid any delay which would preclude carrying out the program."

Although it is not possible to specify in advance if or when emergency expedited consideration may be necessary, several circumstances have called for expedited application processing by OJJDP in the past. These include the following circumstances:

(1) A local tragedy, disaster, or crisis, such as that which occurred a few years ago in Atlanta (because of the child murders) to which OJJDP responded quickly with funds for prevention programming; and

(2) An opportunity to support an outstanding program which is about to cease operations because of the unanticipated loss of existing financial support.

Under these and other emergency circumstances, OJJDP believes that, by administratively expediting the procedures set forth for competition and peer review under Subpart A and Subpart B of this regulation, no delay will occur which would preclude carrying out the program. Consequently, OJJDP is reserving rulemaking under Subpart C. If experience in implementing the competition and peer review process subsequently indicates the need for special emergency expedited review procedures, a rule would be proposed for public comment as Subpart C of this regulation.

Consultation

OJJDP has initiated consultation with the National Science Foundation (NSF) and the National Institute of Mental Health (NIMH) as required by section 223(d)(2) of the Act. The detailed peer review process to be used in carrying out the broad policy specified in Subpart B is under continuing review by these agencies. OJJDP anticipates that the consultation process will be an ongoing one which will permit the OJJDP *Peer Review Manual* to be a fluid document that can be continuously reviewed and modified based on OJJDP's experience in implementing the peer review process. OJJDP has carefully considered their input, as well as comments received from the public, in the formulation of the peer review portion of the regulation.

Discussion of Comments

A proposed regulation was published in the *Federal Register* on April 29, 1985 for public comment. Seven written comments were received: One from two Members of Congress, three from national organizations, one from a University, one from a local government unit, and one from an individual. All comments have been considered by OJJDP in the issuance of this regulation.

The following is a summary of the substantive comments and the response by OJJDP.

1. *Comment:* The exceptions to applicability specified in § 34.2 (a) and (b) appear to establish the date of *initial application*, rather than the date of *selection* of a particular program or project, as determining whether the section 223(d)(1) competition requirements apply.

Response: Section 223(d) of the Act specifies that the date of selection of new programs (or individual projects) governs whether competition and peer review are required. Section 34.2(a) operates to except projects funded under the Private Sector Corrections program, a competitive program announced in the Federal Register on January 6, 1984 (49 FR 932). Although meeting the new competition requirements, and using peer review in the pre-application (concept paper) stage, final selection of projects for funding was based on internal staff review and recommendation. Awards to up to three applicants under this program are anticipated in the near future. No other competitive programs fall under this exception. Section 34.2(b) operates to except a project awarded pursuant to OJJDP's Fiscal Year 1984 program plan to Claremont College to provide State legislative training. The project application was received, reviewed, and approved for award packaging prior to October 12, 1984. It was subsequently awarded on November 24, 1984. No other individual projects fall under this exception.

These "exceptions" are not, in fact, exceptions to the plain meaning of the statutory language of section 223(d) because the Private Sector Corrections program and the Claremont College training program had already been selected for funding by the Administrator prior to October 12, 1984, even though the actual awards were not made until after that date. However, they were and will remain within the regulatory "exceptions" in order to ensure that OJJDP's funding of these applicants after the October 12, 1984 date is not viewed as a circumvention of the new statutory requirements.

2. *Comment:* OJJDP's statement of the statutory exception to competition, as set forth in § 34.2(e), should restate the statutory requirement that the Administrator determine that "other qualified sources are not capable of carrying out the proposed program" in order to make a finding that an applicant for training funds under section 223(d)(1)(B)(iii) is "uniquely qualified" to provide such services.

Response: If an applicant is "uniquely qualified" there can be no other "qualified sources," especially one which is, though qualified, "not capable" of carrying out a proposed project. Consequently, OJJDP views a finding that an applicant is "uniquely qualified" as necessarily incorporating these other statutory requirements.

3. *Comment:* Two commentors raised issues with respect to the fund transfer exceptions specified in § 34.2 (f) and (g). With respect to funds transferred to OJJDP by other Federal agencies, it was suggested that OJJDP should seek programmatic advice from outside experts when appropriate and award such funds competitively. With respect to funds transferred to other Federal agencies by OJJDP, it was suggested that OJJDP be actively involved in program development and administration in order to ensure that experts are consulted and competition is required for grants and other assistance awarded.

Response: The statutory authority under which OJJDP expends funds transferred to it by another Federal agency is that of the transferring agency. Consequently, Section 223(d) would not be applicable. However, in the expenditure or award of such funds, OJJDP will consider the use, as appropriate, of competition and peer review procedures. The ability of OJJDP to transfer Part B, Subpart II, and Part C funds to other Federal agencies is limited. The Economy Act, 31 U.S.C. 1535, authorizes OJJDP to order and pay for goods and services provided by another Federal agency. OJJDP has used this authority, for example, as the basis to transfer funds to the Federal Law Enforcement Training Center to provide statutorily authorized training services to juvenile justice and law enforcement system personnel. In addition, section 241(e)(2) of Part C of the Act authorities NIJJDP to "(2) arrange with and reimburse the heads of Federal agencies for the use of personnel or facilities or equipment of such agencies;". This authority has been used, for example, to transfer funds to the Census Bureau for the Children in Custody Survey. Finally, OJJDP has authority to enter into joint funding arrangements with other Federal agencies under section 205 of the Act. These limited sources of fund transfer authority do not constitute "assistance" awards under section 223(d). However, OJJDP intends, if it is appropriate to do so in a particular fund transfer situation, to maximize the use of both competition procedures and outside experts.

4. *Comment:* In enumerating the criteria to be used in the competitive selection of applications (§ 34.2), the proposed regulation fails to list the statutory requirements for Part B, Subpart II, applications found in section 225 (b) and (c) of the Act.

Response: The minimum administrative and program requirements for Special Emphasis discretionary program applications set forth in section 225(b) and the considerations specified in section 225(c) to be taken into account by the Administrator in selecting applications for award are not germane to the broad competition and peer review policy set forth in the regulation. Individual program announcements, OJJDP policy, and the OJJDP *Peer Review Manual* will, however, incorporate these statutory requirements. OJJDP will ensure that the section 225(b) requirements are met and the Administrator will consider, in making final decisions on applications, the six selection criteria specified in section 225(c).

5. *Comment:* The regulation provision for notification of disposition to applicants (§ 34.4(f)) should provide for feedback of written review comments and summaries to all applicants.

Response: It has been OJJDP's longstanding practice to provide unsuccessful applicants with either a summary of reviewer comments which specifies application deficiencies or copies of reviewer rating and comment sheets (with reviewer identification removed). Where summaries are provided initially, copies of reviewer rating and comment sheets will be provided if an applicant specifically requests these documents. This practice will be continued for all applications subject to the peer review procedure and will be incorporated in the OJJDP *Peer Review Manual.*

6. *Comment:* The exclusion of competitive Part C (NIJJDP) programs, particularly research, development and demonstration programs, from peer review is not warranted, especially when a large number of applications is received in response to a Federal Register program announcement.

Response: Section 225(d)(2) of the Act does not require peer review for competitively funded Part C programs. Although section 241(b) of Part C of the Act states that "The authority of the Institute under this part shall be subject to the terms and conditions of section 225(d)", the OJP Office of General Counsel has advised OJJDP that this language does no more than incorporate the language of section 225(d) into Part C to the extent that it applies by its terms. Congress could easily have applied section 225(d)(2) to Part C in the same manner as it did the competition requirements in section 225(d)(1).

Nevertheless, OJJDP concurs with the thrust of the comment and will use peer review for competitive Part C programs when the Administrator determines that peer review conducted under the terms of Subpart B is appropriate. In some circumstances, however, internal staff review using OJJDP and other Department of Justice officers and employees in the review process may be the preferred review method. The method anticipated by OJJDP for each competitive program will, in any event, be specified in each Part C program announcement (See § 34.4(c).)

7. *Comment:* Is investigator-initiated research (unsolicited research proposals) precluded by the use of a peer review process?

Response: No. Unsolicited research proposals can be considered in two ways: (1) They can be funded under the Section 225(d)(1)(B)(i) exception if determined through peer review conducted under Subpart B to be of such outstanding merit that an award without competition is justified; or (2) they can be funded if the proposal, though not determined to be of outstanding merit under (1) above, inspires an announced competitive research program in that particular area of research and the applicant successfully competes for an award. In addition, OJJDP is reviewing the possibility of instituting an unsolicited research proposal program. Under such a program, a small number of areas would be identified as in need of further research effort. While these applications would be "solicited" in the broad sense, researchers could tailor the exact focus of their proposed research and their research methodology to the needs and methodology which they, rather than OJJDP, perceive to be most relevant and appropriate.

8. *Comment:* The peer review procedures alluded to in § 34.102, including standards of conduct, conflict of interest, compensation, and other procedures which implement OJJDP's peer review policy through the formulation of an "OJJDP *Peer Review Manual*" should also be published in the Federal Register.

Response: Section 225(d)(2) does not require that OJJDP's peer review *policy*, much less the specific *procedures* adopted to implement that policy, be published in the Federal Register for review and comment. However, OJJDP views peer review, where mandated or otherwise appropriate, as an integral part of the overall competitive process. Consequently, the specific principles under which peer review will be conducted (the policy) have been incorporated in Subpart B of this regulation. OJJDP believes the establishment of this policy framework, and the flexible process and procedure to be set forth in the OJJDP *Peer Review Manual* (which will contain the "nuts and bolts" of peer review and how it is related to the overall OJJDP competition policy), will fully implement the Congressional directive of section 225(d). Further, OJJDP intends the *Peer Review Manual* to be a fluid document which will be added to and modified by experience and the continuing input and advice of the National Science Foundation (NSF) and the National Institute of Mental Health (NIMH), the agencies charged in section 225(d)(2) of the Act with advising OJJDP in the implementation of the peer review process. It should also be pointed out that, to OJJDP's knowledge, no agency using peer review publishes its detailed peer review process and procedure in the Federal Register. Many do not even publish a peer review policy or have written procedures. OJJDP's process and procedure will be set forth in the OJJDP *Peer Review Manual* and the *Manual* will be available to interested members of the public.

9. *Comment:* Applications recommended by the peer review process should be binding rather than advisory.

Response: The Administrator, OJJDP, is the Federal official charged with the responsibility to administer OJJDP's programs, including the award and denial of assistance applications (see section 201(b) of the Act). Further, sections 225(d) specifies that assistance programs and projects are to be "reviewed before selection" through a formal peer review process, indicating a clear Congressional intent that the decisionmaking authority remain in the Administrator. It must also be noted that the role of a peer reviewer (evaluator of technical and programmatic merit) is a limited one. It necessarily excludes consideration of administrative and procedural requirements, judgments on compliance with minimum program requirements (such as civil rights requirements), statutory funding criteria, and other criteria such as geographic balance, fiscal responsibility determinations, and the like; which necessarily influence the decisionmaking process. Consequently, Congress has centered the decisionmaking authority in one individual whom it has made responsible for taking *all* elements of the decisionmaking process into account—the Administrator of OJJDP.

10. *Comment:* OJJDP staff should not be able to eliminate from peer review either pre-applications (§ 34.104(a)) or applications (§ 34.104(b)) which lack "sufficient merit" or "fail to meet minimum requirements" to qualify for funding. This is a peer review function.

Response: OJJDP has modified the regulation in response to this comment to clarify the function of staff review of pre-applications and applications undertaken prior to peer review. Pre-applications are reviewed by staff to identify those which either fail to meet or address minimum program requirements, *as specified in a program announcement,* or which *clearly* lack sufficient merit to qualify for funding consideration. For formal applications, only those applicants who fail to meet minimum program requirements, as specified in program announcements, would be eliminated.

Program requirements include such items as being the type of applicant organization eligible for award, providing an evaluation component or plan, providing a budget on the required form, being within specified funding limits, etc. Because few program requirements are generally required to be specifically addressed in pre-applications, the regulation allows staff review to eliminate those pre-applications from full application development or pre-application peer review, as the case may be, which clearly lack sufficient merit to possibly qualify for funding consideration. This saves the applicant a needless waste of time and expense in developing a full proposal, saves OJJDP funds, and saves OJJDP's peer reviewers a needless waste of their time and energy reviewing proposals which would not qualify for full application development. For full applications, only those proposals which fail to meet applicable program requirements at a minimum satisfactory level would be eliminated from peer review. This should eliminate most proposals that are also without sufficient merit to warrant peer review consideration. Again, this level of staff review will eliminate the needless waste of peer review resources.

11. *Comment:* Section 34.106(c) provides that peer review will result in a "relative aggregate ranking of applications . . . based upon numerical values assigned by individual peer reviewers." OJJDP should assign point values to the application review criteria contained in program announcements so that applicants will have advance notice of the relative importance of each criterion.

Response: Agree. OJJDP has added a new subsection (b) to § 34.3 (moved from § 34.4(c)) with an additional sentence at the end of subsection (b) expressly stating that "The relative weight (point value) for each selection criterion will be specified in the program announcement."

12. *Comment:* Peer review recommendations should be binding with respect to noncompetitive assistance awards (§ 34.104(f)) only when in the negative. In addition, procedures should be established to provide a competitive process when a noncompetitive proposal presents an idea or concept worth funding but is not of the requisite "outstanding merit" to warrant a noncompetitive award.

Response: Agree. Section 34.104(f) has been modified to clarify the first point and to add a sentence indicating that the Administrator may consider, where a noncompetitive application is determined through peer review not to be of "outstanding merit," the issuance of a competitive program announcement to implement the idea or concept initially proposed by the applicant. The applicant would, of course, be free to compete for the award.

13. *Comment:* Although peer review recommendations are generally advisory only, the Administrator should clearly articulate the basis for funding decisions that deviate from the peer reviewers' recommendations.

Response: Agree. The OJJDP Peer Review Manual will provide that in the event the Administrator's final selections differ from the peer reviewers' recommendations, a written "statement of reasons" will be completed by the Administrator and made a part of the program record.

14. *Comment:* Rules should be established to set forth procedures for reconsideration of competitive or noncompetitive proposals that are initially rejected.

Response: The administrative review procedure applicable to Part B, Subpart II, and Part C assistance award denials is based on Sections 802-804 of Title I of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, as implemented in 28 CFR Part 18. This regulation has been published in the Federal Register for comment (See 50 FR 11306, March 29, 1985) and is expected to be published in final form in the near future.

15. *Comment:* Several commentors raised general questions about how OJJDP will conduct peer review meetings and "ad hoc" mail reviews.

Response: Section 34.108(b) has been modified to specify that the OJJDP program manager will instruct peer reviewers and oversee the conduct of peer review group meetings. For competitive programs, resulting in a large number of applications, meetings of peer reviewers will be the rule. Mail reviews will, however, be the standard procedure for review of noncompetitive proposals to determine whether they are of such outstanding merit as to justify an award without competition and when a small number of applications is submitted in response to a competitive program announcement. When mail reviews are used, OJJDP will provide a copy of the OJJDP *Peer Review Manual* and appropriate written instructions to each peer reviewer.

16. *Comment:* The use of Department of Justice staff as peer reviewers is neither programmatically justified nor consistent with section 223(d)(2) which requires that the formal peer review process utilize "experts (other than officers and employees of the Department of Justice) in fields related to the subject matter of the proposed program."

Response: OJJDP agrees with the proposition, expressed by one commentor and by both NIMH and NSF officials, that the best peer review process is one which achieves an independent review of the technical and programmatic merit of each proposal. Consequently, the final regulation establishes as OJJDP policy that peer review groups will be made up entirely of experts other than officers and employees of the Department of Justice (See § 34.103 and § 34.108).

The role of Department of Justice officers and employees will, however, continue to be substantial because these individuals' expertise will be tapped through the *internal review* of programs and projects to determine compliance with basic program and statutory requirements, to review the results of peer review, and to provide overall evaluations and program recommendations to the Administrator.

Consequently, § 34.107 has been revised to reflect this separate and distinct role, outside the peer review process, for OJJDP and other DOJ program staff. Other sections of the regulation have received minor technical changes to reflect the distinction between peer review and the other steps in the overall review and funding process that complement peer review.

17. *Comment:* Peer review should utilize regional expertise and include experts in the delivery of direct services to youth and their families.

Response: OJJDP's criteria for selection of reviewers (§ 34.108) will be set forth in the OJJDP *Peer Review*

Manual. Both geographic balance and specialized expertise in areas or fields related to a particular program (See § 34.108(b)) are included as reviewer selection/qualification criteria. However, experience in the delivery of direct services to youth may not be relevant to all competitive programs selected by OJJDP and cannot, consequently, be made a minimum qualification for all peer reviewers.

Executive Order 12291

This announcement does not constitute a "major" rule as defined by Executive Order 12291 because it does not result in: (a) An effect on the economy of $100 million or more, (b) a major increase in any costs or prices, or (c) adverse effects on competition, employment, investment, productivity, or innovation among American enterprises.

Regulatory Flexibility Act

This final rule does not have "significant" economic impact on a substantial number of small "entities", as defined by the Regulatory Flexibility Act (Pub. L. 96-354).

Paperwork Reduction Act

There are no collection of information requirements contained in this regulation required to be submitted to the Office of Management and Budget for review under the Paperwork Reduction Act, 44 U.S.C. 3504(h).

List of Subjects in 28 CFR Part 34

Grant programs, juvenile delinquency.

Accordingly, Title 28 Code of Federal Regulations is amended by adding Part 34 to read as follows:

PART 34—OJJDP COMPETITION AND PEER REVIEW PROCEDURES

Subpart A—Competition

Sec.
34.1 Purpose of applicability.
34.2 Exceptions to applicability.
34.3 Selection criteria.
34.4 Additional competitive application requirements and procedures.

Subpart B—Peer Review

34.100 Purpose and applicability.
34.101 Exceptions to applicability.
34.102 Peer review procedures.
34.103 Definitions.
34.104 Use of peer reviews.
34.105 Peer review methods.
34.106 Number of peer reviewers.
34.107 Use of Department of Justice staff.
34.108 Selection of reviewers.
34.109 Qualifications of peer reviewers.
34.110 Management of peer reviews.
34.111 Compensation.

Subpart C—Emergency Expedited Review—[Reserved]

Authority: Juvenile Justice and Delinquency Prevention Act of 1974, as amended, (42 U.S.C. 5601 et seq.).

Subpart A—Competition

§ 34.1 Purpose and applicability.

(a) This subpart of the regulation implements section 223(d)(1) (A) and (B) of the Juvenile Justice and Delinquency Prevention Act of 1974, as amended. This provision requires that projects funded under new programs selected for categorical assistance awards under the Special Emphasis Discretionary Grant Program (section 224) or by the National Institute for Juvenile Justice and Delinquency Prevention under Part C, after October 12, 1984, be selected through a competitive process established by rule by the Administrator, OJJDP. The statute specifies that this process must include announcement of fund availability for assistance programs, the criteria applicable to the selection of applicants for assistance, and a description of the procedures applicable to the submission and review of assistance applications.

(b) This subpart of the regulation applies to all grant, cooperative agreement, and other assistance awards selected by the Administrator, OJJDP, or the Administrator's designee, hereinafter referred to in this part as the Administrator, after October 12, 1984, under Part B, Subpart II, section 224, and under Part C of the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. 5601), except as provided in the Exceptions to Applicability set forth below:

§ 34.2 Exceptions to applicability.

The following are assistance and procurement contract award situations that OJJDP considers to be outside the scope of the section 223(d) competition requirement.

(a) Assistance awards to projects under competitive programs announced prior to October 12, 1984.

(b) Assistance awards to projects for which initial applications were received and the applicant selected for award by the Administrator prior to or on October 12, 1984, but which received an initial award after such date.

(c) Assistance awards to continue activities initially funded under projects selected for award prior to or on October 12, 1984.

(d) Assistance awards to projects if the Administrator has made a written determination that the proposed program is not within the scope of any program announcement expected to be issued, is otherwise eligible for an award, and if the proposed project is of such outstanding merit, as determined through peer review under Subpart B, that an assistance award without competition is justified (section 223(d)(1)(B)(i)).

(e) Assistance awards for training services under Part C, section 244, if the Administrator has made a written determination that the applicant is uniquely qualified to provide such services (section 223(d)(1)(B)(ii)).

(f) Assistance awards of funds transferred to OJJDP by another Federal agency to augment authorized juvenile justice programs, projects, or purposes.

(g) Funds transferred to other Federal agencies by OJJDP for program purposes as authorized by law.

(h) Procurement contract awards which are subject to applicable Federal laws and regulations governing the procurement of goods and services for the benefit and use of the government.

(i) Assistance awards from the 5% "set aside" of Special Emphasis funds under section 224(e).

§ 34.3 Selection criteria.

(a) All programs and individual project applications subject to competition under § 34.1 of this subpart will, at a minimum, be subject to review based on the extent to which they meet the following general selection criteria:

(1) The problem to be addressed by the project is clearly stated;

(2) The objectives of the proposed project are clearly defined;

(3) The project design is sound and contains program elements directly linked to the achievement of project objectives;

(4) The project management structure is adequate to the successful conduct of the project;

(5) Organizational capability is demonstrated at a level sufficient to successfully support the project; and

(6) Budgeted costs are reasonable in comparison to the activities proposed to be undertaken.

(b) The general selection criteria set forth under § 34.3(a), above, may be supplemented for each announced competitive program by program specific selection criteria for the particular Part B, Subpart II, or Part C program. Such announcements may also modify the general selection criteria to provide greater specificity or otherwise improve their applicability to a given program. The relative weight (point value) for each selection criteria will be specified in the program announcement.

§ 34.4 Additional competitive application requirements and procedures.

(a) *Applications for grants.* Any applicant eligible for assistance may submit on or before such submission deadline date or dates as the Administrator may establish in program announcements, an application containing such pertinent information and in accordance with the forms and instructions as prescribed therein and any additional forms and instructions as may be specified by the Administrator. Such application shall be executed by the applicant or an official or representative of the applicant duly authorized to make such application and to assume on behalf of the applicant the obligations imposed by law, applicable regulations, and any additional terms and conditions of the assistance award. The Administrator may require any applicant eligible for assistance under this Subpart to submit a preliminary proposal for review and approval prior to the acceptance of an application.

(b) *Cooperative arrangements.* (1) Eligible parties may enter into cooperative arrangements with other eligible parties, including those in another State, to apply for assistance.

(2) A joint application made by two or more applicants for assistance under this Subpart may have separate budgets corresponding to the programs, services and activities performed by each of the joint applicants or may have a combined budget. If joint applications present separate budgets, the Administrator may make separate awards, or may award a single assistance award authorizing separate amounts for each of the joint applicants.

(c) *Evaluation of applications submitted under Part C of the Act.* All applications filed in accordance with § 34.1 of this Subpart for assistance with Part C funds shall be evaluated by the Administrator through officers, employees, and/or such experts or consultants engaged for this purpose as the Administrator determines are specially qualified in the particular Part C program area covered by the announced program. The program announcement shall clearly state the application review procedures (peer review or other) to be used for each competitive Part C program announcement.

(d) *Applicant's performance on prior award.* Where the applicant has previously received an award from OJJDP or another Federal agency, the applicant's compliance or noncompliance with requirements applicable to such prior award as reflected in past written evaluation reports and memoranda on performance, and the completeness of required submissions, may be considered by the Administrator. However, in any case where the Administrator proposes to deny assistance based upon the applicant's noncompliance with requirements applicable to a prior award, the Administrator shall do so only after affording the applicant reasonable notice and an opportunity to rebut the proposed basis for denial of assistance.

(e) *Disposition of Applications.* On the basis of competition and applicable review procedures completed pursuant to this part, the Administrator will either:

(1) Approve the application for funding, in whole or in part, for such amount of funds, and subject to such conditions as the Administrator deems necessary or desirable for the completion of the approved project;

(2) Determine that the application is of acceptable quality for funding, in that it meets minimum criteria, but that the application must be disapproved for funding because it did not rank sufficiently high in relation to other applications approved for funding to qualify for an award based on the level of funding allocated to the program; or

(3) Reject the application for failure to meet the applicable selection criteria at a sufficiently high level to justify an award of funds or for any other reason which the Administrator determines adversely impacts upon the applicant's capability to successfully carry out the project.

(f) *Notification of disposition.* The Administrator will notify the applicant in writing of the disposition of the application. A signed Grant/Cooperative Agreement form will be issued to notify the applicant of an approved project application.

(g) *Effective date of approved grant.* Federal financial assistance is normally available only with respect to obligations incurred subsequent to the effective date of an approved assistance project. The effective date of the project will be set forth in the Grant/Cooperative Agreement form. Recipients may be reimbursed for costs resulting from obligations incurred before the effective date of the assistance award if such costs are authorized by the Administrator in the notification of grant award or subsequently in writing, and otherwise would be allowable as costs of the assistance award under applicable guidelines, regulations, and grant terms and conditions.

Subpart B—Peer Review

§ 34.100 Purpose and applicability.

(a) This subpart of the regulation implements section 225(d)(2) of the Juvenile Justice and Delinquency Prevention Act of 1974, as amended. This provision requires that projects funded under new programs selected for categorical assistance awards under the Special Emphasis discretionary grant program (section 224), after October 12, 1984, shall be reviewed before selection and thereafter as appropriate through a formal peer review process. Such process must utilize experts (other than officials and employees of the Department of Justice) in fields related to the subject matter of the proposed program.

(b) This subpart of the regulation applies to all grant, cooperative agreement, and other assistance awards selected by the Administrator, OJJDP, after October 12, 1984, under Part B, Subpart II, section 224, and awards under Part C that are being considered for noncompetitive award (and hence subject to section 225(d)(1)(b)(i) of the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. 5601)), except as provided in the Exceptions to Applicability set forth below.

§ 34.101 Exceptions to applicability.

The assistance and procurement contract situations specified in § 34.2 (a), (b), (c), (e), (f), (g), (h), and (i) of Subpart A and all Part C awards competitively funded pursuant to section 225(d)(1)(A) are considered by OJJDP to be outside the scope of the section 225(d) peer review requirement as set forth in this subpart.

§ 34.102 Peer review procedures.

The OJJDP peer review process will be contained in an OJJDP *Peer Review Manual*, which is currently under development in consultation with the Directors and other appropriate officials of the National Science Foundation and the National Institute of Mental Health. In addition to specifying substantive and procedural matters related to the peer review process, the *Manual* will address such issues as standards of conduct, conflict of interest, compensation of peer reviewers, etc. The peer review process for all assistance awards subject to this Subpart will be conducted in a manner consistent with this Subpart as implemented in the Peer Review Manual.

§ 34.103 Definitions.

"Peer review" means the technical evaluation by a group of experts (other than officers and employees of the Department of Justice) qualified by training and experience to give expert advice, based on selection criteria established under Subpart A of this part or in a program announcement, on the technical and programmatic merit of assistance.

§ 34.104 Use of peer review.

(a) Each program announcement will indicate the program specific peer review procedures and selection criteria to be followed in peer review for that program. In the case of programs for which a large number of applications is expected, pre-applications (concept papers) may be required at the Administrator's option. Pre-applications will be reviewed by qualified OJJDP staff to eliminate those pre-applications which fail to meet minimum program requirements, as specified in a program announcement, or clearly lack sufficient merit to qualify as potential candidates for funding consideration. If appropriate, the Administrator may subject both pre-applications and formal applications to the peer review process.

(b) Where formal applications are required in response to a program announcement, an initial review will be conducted by qualified OJJDP staff, in order to eliminate from peer review consideration applications which do not meet minimum program requirements. Such requirements will be specified in the program announcement. Applicants determined to be qualified and eligible for further consideration will then be considered under the peer review process.

(c) The results of peer review under a competitive program will be a relative aggregate ranking of applications in the form of "Summary Ratings." These will ordinarily be based on numerical values assigned by individual peer reviewers, and as set forth in the OJJDP *Peer Review Manual.*

(d) Peer review recommendations, in conjunction with the results of internal review and any necessary supplementary review, will assist the Administrator's consideration of competing applications and selection of applications for funding.

(e) Comments on applications may also be requested from appropriate specialists and consultants outside of Government.

(f) Peer review recommendations are advisory only and are binding on the Administrator only as provided by section 223(d)(1)(B)(i) for noncompetitive assistance awards to programs determined through peer review not to be of such outstanding merit that an award without competition is justified. In such case, the determination of whether to issue a competitive program announcement will be a matter subject to the exercise of the Administrator's discretion.

§ 34.105 Peer review methods.

(a) Peer review will normally consist of written comments provided in response to the general selection criteria established under Subpart A of this part and any program specific selection criteria identified in the program announcement, together with the assignment of numerical values. Peer review may be conducted at meetings of peer reviewers held under OJJDP oversight, through mail reviews, or a combination of both. Where appropriate, site visits may also be employed. The primary method of peer review anticipated for each announced competitive program, including all evaluation criteria to be used by peer reviewers, will be specified in each program announcement.

(b) For peer review conducted through meetings, peer review panelists will be gathered together for instruction by the OJJDP program manager, including review of the OJJDP *Peer Review Manual,* who will then oversee the conduct of individual and group review sessions, as appropriate. Where time or other factors such as cost preclude the convening of a peer review panel, mail reviews will be used. For competitive programs, mail reviews will be used only where the Administrator makes a written determination of necessity. Mail reviews will be the standard procedure used for review of noncompetitive assistance applications being considered for Part B, Subpart II, or Part C fund support. In such case, the application would have to be determined, through the peer review process, to qualify as "Outstanding".

§ 34.106 Number of peer reviewers.

The number of peer reviewers will vary by program (as affected by the volume of applications anticipated or received). OJJDP will select a minimum of three peer reviewers (qualified individuals who are not officers or employees of the Department of Justice) for each program or project review in order to ensure a diversity of backgrounds and perspectives. In no case will fewer than three reviews be made of each individual application.

§ 34.107 Use of Department of Justice staff.

OJJDP will use qualified OJJDP and other DOJ staff as internal reviewers. Internal reviewers determine applicant compliance with basic program and statutory requirements, review the results of peer review, and provide overall program evaluation and recommendations to the Administrator.

§ 34.108 Selection of reviewers.

The Administrator, OJJDP, will make the final selection of both peer reviewers and internal reviewers. The selection process for peer reviewers will be detailed in the OJJDP *Peer Review Manual.*

§ 34.109 Qualifications of peer reviewers.

The general reviewer qualification criteria to be used by the Administrator in the selection of peer reviewers are:

(a) Generalized knowledge of juvenile justice or related fields.

(b) Specialized knowledge in areas or fields addressed by the applications to be reviewed under a particular program.

Additional details will be provided in the OJJDP *Peer Review Manual.*

§ 34.110 Management of peer reviews.

A technical support contractor may assist the OJJDP program manager in managing the peer review process.

§ 34.111 Compensation.

All peer reviewers will be eligible to be paid an appropriate consulting fee. Detailed information will be provided in the OJJDP *Peer Review Manual.*

Subpart C—Emergency Expedited Review—[Reserved]

Alfred S. Regnery,

Administrator, Office of Juvenile Justice and Delinquency Prevention.

[FR Doc. 85-[illegible] Filed 8-1-85; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD7-85-37]

Temporary Drawbridge Operation Regulations; Atlantic Intracoastal Waterway, SC

AGENCY: Coast Guard, DOT.

ACTION: Temporary rule.

SUMMARY: The Coast Guard is temporarily changing the regulations governing the Ben Sawyer Bridge across Sullivan's Island Narrows by permitting the number of openings to be further

OJJDP PEER REVIEW MANUAL

Office of the Administrator
Office of Juvenile Justice and Delinquency Prevention
Washington, D.C 20531
November 5, 1985

Purpose. This manual establishes guidance for peer reviewers employed by the Office of Juvenile Justice and Delinquency Prevention (OJJDP). It supplements the Department of Justice, OJJDP, Regulation on Competition and Peer Review Policy, 28 CFR Part 34 (See Appendix A).

The OJJDP Review System. Accomplishment of OJJDP's mission is dependent, to a large extent, upon the success of the programs and projects it funds. In this regard, a critical part of the process is the initial selection of projects for award. There are two main stages in this process. The first is "peer review", the technical and programmatic evaluation of project applications using specific review criteria established in program announcements. The second is "internal review", to determine applicant compliance with basic program and statutory requirements, to review the results of peer review, and to provide overall evaluations and program recommendations to the Administrator. "Supplementary review" may also be obtained in addition to peer review and internal review. The results of these reviews, if needed, would augment the peer review and internal review processes.

Peer Review--Purpose. The purpose of the peer review stage of the OJJDP review system is to obtain advice on the technical and programmatic merit of grant applications (in the form of funding recommendations) in order that OJJDP officials may have the benefit of an independent assessment of all applications under review. Thus, this stage in the review system helps greatly in the identification of those applications evidencing the highest level of overall merit.

Peer Review--Policy. It is the policy of the OJJDP to use peer review in the evaluation of all assistance awards except those specifically excluded under the terms of the OJJDP Competition and Peer Review regulation (See "Exclusions", 28 CFR Part 34). The Office has used peer review in the evaluation of applications submitted under competitive program announcements (mostly in the case of research and evaluation projects, and to a lesser extent, assistance awards) for several years. Therefore this policy is now modified to expand the application of peer review to all types of assistance awards except those otherwise excluded from coverage. OJJDP will also use peer review in areas where it is not required, as determined to be appropriate. For example, peer review may be used for competitively awarded research, developmental, or demonstration projects funded under Part C of the Juvenile Justice Act.

Peer review recommendations are advisory only and not binding on the OJJDP Administrator except in the case of noncompetitive project applications that are determined through peer review not to be of such outstanding merit as to justify a noncompetitive award. Although the Office's enabling legislation (The Juvenile Justice and Delinquency Prevention Act of 1974, as amended) requires peer review for certain applications, the final decision whether or not to fund an application rests solely with the OJJDP Administrator. However, the Administrator will give great weight to peer review recommendations in the selection of projects for award.

Definitions. "Peer review" means the technical evaluation by a group of experts qualified by training and experience in a particular area or field of juvenile justice or a related field to be considered "peers" of applicants and give expert advice on the technical and programmatic merit of assistance applications in those areas or fields.

A "peer reviewer" is an individual qualified to perform peer review and who is not an officer or employee of the Department of Justice.

A "Peer Review Group" (PRG) consists of three or more peer reviewers selected to review, evaluate, and make recommendations with respect to a group of pre-applications or applications submitted to OJJDP in response to a competitive program announcement, or to review a single noncompetitive application to determine whether it is of outstanding merit. The work of a PRG may be conducted in person or by mail.

"Peer review recommendations" consist of actions (ranging from funding to denial) that peer reviewers recommend to the Administrator on pre-applications or applications submitted in response to a competitive program announcement, or on noncompetitive applications.

An "internal reviewer" is an officer or employee of the Department of Justice qualified by experience and expertise to conduct appropriate application/program reviews.

An "Internal Review Group" (IRG) consists of those internal reviewers selected to review a group of pre-applications or applications submitted to OJJDP in response to a competitive program announcement, to review a single noncompetitive application, or to review and evaluate the recommendations of a PRG as part of the internal review process.

"Supplementary reviews" are those performed by peer reviewers which are necessary for particular programs or project applications: 1) to address highly technical aspects of applications which initial PRG members are not qualified to address; 2) to obtain additional reviews in instances in which the initial PRG results do not represent a consensus of opinion with respect to a funding recommendation; or 3) in the event of conflicts of interest within the Peer Review Group, resulting in an insufficient number of reviews.

"Competitive" awards are those made under OJJDP program announcements (published in the Federal Register), which inform the public of the availability of funds for specific purposes and invite formal applications (or, in some instances, pre-applications).

"Noncompetitive" awards are those made in the absence of program announcements inviting applications. Such applications may be solicited by OJJDP or unsolicited, i.e. submitted at the initiative of the applicant.

"Financial review" refers to a determination of whether the proposed costs contained in a formal application are allowable and adequately justified. This review is performed by the Financial Management Grants Assistance Division, Office of the Comptroller, Office of Justice Programs (OJP). (OJJDP is located within the organizational structure of the OJP.)

Number of Peer Reviewers. The number of peer reviewers constituting a PRG will vary by program (as affected by the volume of applications anticipated or received). A minimum of three peer reviewers will review each application, whether the review is conducted through PRG meetings or by mail. The objective is to ensure a diversity of backgrounds and perspectives.

Reviewer Qualifications. Peer Reviewers shall exhibit: 1) generalized knowledge of juvenile justice or related fields; or 2) specialized knowledge in areas or fields addressed by the applications to be reviewed under a particular program; or 3) a combination of 1) and 2). Use of these reviewer criteria will be governed by the review task. For example, in the case of an application, or a group of applications, on which the Administrator wishes advice with respect to their value to the field, greater weight would be assigned to the first criterion. However, in the case of a group of applications submitted in response to a highly technical or specialized program area, greater weight would be assigned to the second criterion.

Peer Review Group Pool. OJJDP will maintain a "pool" of potential peer reviewers, from which peer reviewers shall be selected. Any individual with requisite expertise may be included in the pool at his or her request or by OJJDP. This pool is maintained primarily for peer review purposes. Every effort will be made to include a sufficient number of nationally recognized and interested experts to meet the Office's peer review needs. Experts are continually added as OJJDP staff and officials learn of additional experts not presently in the pool.

Selection of Reviewers. A Peer Review Group shall be created for the purpose of reviewing applications (or preapplications) submitted under each program announcement or to review a single noncompetitive application being considered for funding on the basis of outstanding merit. Selection of peer reviewers will be made from the peer review group pool. The OJJDP Program Manager will specify the particular areas of expertise applicable to each review task. Those reviewers within the pool possessing such areas of expertise shall be identified as "eligible reviewers". In addition, the Program Manager may add other qualified experts to the list of eligible reviewers. The Program Manager shall then select from among the eligible reviewers, using the following criteria: 1) prior performance on similar tasks (if any), 2) applicability of expertise relevant to the particular task, and 3) where appropriate, e.g., in the case of a requirement of several types of expertise to accomplish a particular review task, representation of the necessary range of types of expertise.

In addition, the Program Manager shall give particular attention to avoiding the creation of unbalanced PRGs. It is important that such groups be structured to provide broad representation and many views on matters under the PRG's purview. Particular attention will be given to groups who should be, but are not presently, well represented. Some general considerations that should help achieve reasonable balance in PRGs are the following: 1) Individual qualifications--each member should have recognized pertinent expertise or demonstrated ability as a reviewer, or both; 2) Fields of expertise--within reasonable limits, members' fields of specialty should be complementary within the group; 3) Public impact--where pertinent, some members should be representative of regions, organizations, or segments of the public directly affected by issues under consideration; 4) Academic impact--members from the academic community should represent small, medium, and large institutions, as well as public and private institutions. Whenever possible, concurrent or successive selections of individuals from the same institution should be avoided; 5) Nonacademic impact--Representatives from outside the academic community are desirable in all instances--from both public and private programs; 6) Underrepresented views--special attention should be paid to obtaining qualified reviewers from such underrepresented groups as minorities, women, and the handicapped; 7) Age distribution--members should be selected from as broad a range of age groups as is feasible; and 8) Geographic balance--members should be drawn from as broad a set of geographical areas as is feasible.

Selection of internal reviewers shall be based upon the level and type of expertise required for the review task. Program Managers shall submit a peer review group recommendation to the cognizant Division Director, the Deputy Administrator, and the Administrator.

The Administrator, OJJDP, shall have final approval authority over the composition of Peer Review Groups and Internal Review Groups.

Standards of Conduct. All peer reviewers employed by OJJDP are "special Government employees" and, as such, are subject to Department of Justice Standards of Conduct (28 C.F.R. -- See Appendix B).

Conflict of Interest. In addition to the general DOJ conflict of interest rules, set forth in its Standards of Conduct, OJJDP peer reviewers are subject to the following rules with respect to conflict of interest.

It is OJJDP policy to prohibit a PRG member from participating in the review of any application when he or she has a conflict of interest. (Such a potential or real conflict must be brought to the attention of the OJJDP Program Manager.) Accordingly, such

PRG members may not receive copies, participate in site visits, or be present during the PRG's discussion of any application in which there is a real or apparent conflict of interest.

Individuals shall not be used as peer reviewers, or shall have appropriate restrictions placed on their participation, where the following relationships become known to the OJJDP Program Manager: 1) reviewer would be directly involved in the project, e.g., as an advisory board member, a consultant, collaborator, or as a conference speaker whose expenses would be paid from the grant; 2) reviewer is from the same institution or organization as the applicant or was recently employed there; 3) reviewer and applicant have a family relationship; 4) reviewer and applicant have been related as a student and thesis advisor or post-doctoral advisor; 5) reviewer and applicant are known to be close friends or open antagonists; 6) reviewer and applicant have collaborated recently on work related to the proposal; 7) reviewer has a proposal planned for submission or currently under review within the same subject area; 8) reviewer has had a recent declination, substantial budget reduction, or other unfavorable action from the OJJDP; 9) reviewer is currently directly involved in a closely associated project; 10) reviewer is under consideration for a position at the applicant's institution or organization; 11) reviewer has served in an official or semi-official capacity in a closely associated organization; or 12) reviewer's organization has members (or closely affiliated officials; e.g., board of trustees members) who serve in an official capacity with the applicant organization or institution.

Standard Review Criteria. All program and individual project applications subject to PRG review will, at a minimum, be evaluated using the following standard review criteria: 1) the problem to be addressed by the project is clearly stated; 2) the objectives of the proposed project are clearly defined; 3) the project design is sound and contains program elements directly linked to the achievement of project objectives; 4) the project management structure is adequate to the successful conduct of the project; 5) organizational capability is demonstrated at a level sufficient to successfully support the project; and 6) budgeted costs are reasonable in comparison to the activities proposed to be undertaken.

Each program announcement will indicate any additional program-specific review criteria to be followed in peer review for that program.

Pre-Applications. In the case of programs for which a large number of applications is expected, pre-applications (also called "concept papers") may be required at the Administrator's option. Generally, pre-applications will be initially reviewed by qualified OJJDP staff to eliminate those which clearly lack sufficient merit to qualify as potential candidates for funding consideration, because of failure to meet minimum statutory or program requirements. Minimum statutory (where applicable) and program requirements will be specified in the program announcement. Staff review is not intended to eliminate from further consideration pre-applications which might be considered marginal; rather, this review would only eliminate those preapplications which have such serious deficiencies that further development of a formal application would constitute a waste of applicant and OJJDP resources. An example is a proposal to establish a diversion program which is submitted in response to a program announcement requesting proposals to provide intensive treatment for chronic violent offenders within correctional institutions.

The Administrator may, as determined by the number of applications, program complexity and other factors as may be appropriate, subject pre-applications to the peer review process prior to the development of formal applications.

Internal Review. This review shall be conducted to determine the level of applicant compliance with specific program and statutory requirements. These requirements will vary from one program to the next and will be included in program announcements. In addition, this review may include review and evaluation of the peer review process, peer review recommendations, and the results of supplementary reviews, if any.

Internal review may be conducted by the Program Manager or by a formally established Internal Review Group. It shall result in an overall evaluation of the application(s) and the identification of major applicant strengths and weaknesses.

Peer Review Methods. Peer review may be conducted at meetings of peer reviewers held under OJJDP oversight, through mail reviews, or a combination of both. Where appropriate, site visits by PRGs may also be employed. The primary method of peer review for each announced competitive program, including all review criteria to be used by peer reviewers, will be specified in each program announcement.

For peer review conducted through meetings, PRG members will be gathered together for instruction, including review of this manual, and the OJJDP Program Manager will oversee the conduct of review sessions. Where time or other factors such as cost preclude the convening of a PRG, mail reviews, with appropriate instructions, will be used. Mail reviews will be the normal procedure used to evaluate competitive applications when only a small number is submitted.

The peer review process consists of two types of assessments of applications: qualitative and quantitative. For each application, at least three primary reviewers will be assigned to perform both of these types of review.

The qualitative assessment shall consist of written comments on each of the review criteria set forth above.

The quantitative assessment shall consist of numerical values assigned to each of the applications using the review criteria. These values shall reflect the written comments on each criterion. The maximum score on each criterion shall be indicated in the program announcement and shall total 100 points. By way of illustration:

1) Statement of the problem—20 points

2) Definition of objectives—20 points

3) Project design—20 points

4) Management structure—15 points

5) Organizational capability—15 points

6) Reasonableness of costs—10 points

The results of peer review will be a relative aggregate ranking of applications in the form of "Summary Ratings". These will be based on numerical values assigned by individual peer reviewers, in the following manner:

Outstanding (90-100 points): Recommended for funding. Highest priority for support based on outstanding merit.

Good (70-89 points): Recommend for funding. Qualified for support if sufficient funds are available.

Fair (50-69 points): Qualified for support, provided specified deficiencies are corrected.

Poor (Fewer than 50 points): Should not be supported because the proposal has serious deficiencies which disqualify it for funding support.

As determined to be appropriate by OJJDP, when a group of applications is reviewed by a PRG at a meeting, each application may also be reviewed by up to three "secondary reviewers". Their review shall be conducted for informational and discussion purposes only and not be subject to the formal rating procedure. Their review will prepare them to discuss the application actively with the primary reviewers. Following completion of the primary and secondary reviews, the entire PRG shall discuss each application. Such discussion shall be led by the Program Manager. Following this discussion, the primary reviewers then have the opportunity to revise their criterion and aggregate scores. The average of these aggregate scores constitutes the PRG's recommendation with respect to funding of each application.

Following completion of peer review, internal staff review, and any supplementary reviews determined to be necessary, the Program Manager shall forward the results of the review process to the Administrator, the cognizant Division Director and the Deputy Administrator, together with an overall summary of the review process and the resulting recommendations. The peer review recommendations, in conjunction with the results of internal review, are intended to assist the Administrator in the consideration of competing applications and the selection of applications for funding. Should the

Administrator's final selections differ from the PRG's recommendations, a written statement of reasons shall be completed by the Administrator and made a part of the program record. The Administrator's final selections are also subject to financial review and approval by the Office of the Comptroller, OJP.

Review of Noncompetitive Applications. Noncompetitive assistance applications which the Administrator determines warrant peer review, pursuant to Section 225 (d)(1)(B)(i), will normally be evaluated through mail reviews. Evaluations of these applications shall be conducted using the same methods as for competitive applications. However, in addition to the six standard review criteria, a seventh criterion shall be used: the extent to which the program (or project) concept is of outstanding merit. This criterion shall be allocated an appropriate proportion of the possible 100 points. In order to qualify for funding, such applications must be determined through the peer review process to rate as "outstanding" by a majority of the peer reviewers, and the remaining reviewer(s) must rate the application at least "good".

Guidelines for Selection of Applications. All applications will, at a minimum, be subject to review based on the extent to which they meet the "general selection criteria" specified in 28 C.F.R., Sec. 34.3 and any additional competitive application requirements and procedures as specified in the program announcement.

In addition to a consideration of general and program-specific selection criteria, peer review recommendations, and any internal and supplementary reviews submitted for consideration, the Administrator, in determining whether or not to approve applications for funding under Part B, Subpart II, Section 224, of the Juvenile Justice Act, will consider: 1) the relative cost and effectiveness of the proposed project in effectuating the purposes of Part B; 2) the extent to which the proposed project will incorporate new or innovative techniques; 3) the extent to which the proposed project meets the objectives and priorities of the State Formula Grant Plan, when a State plan has been approved by the Administrator under Sec. 223(c) and when the location and scope of the program makes such consideration appropriate; 4) the increase in capacity of a public or private agency, institution, or individual applicant to provide services to address juvenile delinquency and juvenile delinquency prevention; 5) the extent to which the proposed project serves communities which have high rates of youth unemployment, school dropout, and delinquency; and 6) where applicable, the adverse impact that may result from the restriction of eligibility, based upon population, for cities with a population greater than forty thousand, located within States which have no city with a population over two hundred and fifty thousand.

Each program announcement will set forth the specific criteria to be used in the review of proposals submitted under it. However, the Administrator may use the above criteria (and others as specified in the program announcement, such as geographic balance) in making the final funding decision.

The Administrator's application of these considerations does not obviate use of peer review results. Rather, in the context of peer review, these factors would be most applicable in the event of closely competing applications. Thus, application of the above considerations would help achieve a pattern of balanced funding—other things being equal.

Confidentiality. PRG members must treat as absolutely confidential all application materials, reviewers' comments, deliberations, and recommendations of the PRG. Reviewers are prohibited from providing any information about the PRG's evaluation of an individual application to the Project/Program Director or cognizant staff of the proposed project. Also, application materials and information about the PRG's discussion or recommendations on particular applications must not be divulged to or discussed with any persons not involved in the review process. Should a PRG member receive a request for application material or information about review discussions or recommendations, the individual requesting the information is to be referred to the OJJDP Program Manager.

Informing Reviewers of Action. OJJDP staff workloads normally preclude routine notice to each reviewer of the action taken on specific proposals. Reviewer inquiries should be addressed to the OJJDP Program Manager.

Informing Applicants of Reviewer Comments. Unsuccessful applicants will receive (on their proposal only) either a summary of reviewer comments which specify application deficiencies, or copies of reviewer rating and comment sheets (with reviewer identification removed). Where summaries are provided initially, copies of reviewer rating and comment sheets will be provided if an applicant specifically requests these documents. Likewise, successful applicants may receive both summaries of reviewer comments and verbatim copies of peer reviews (excluding reviewer identification). The office contact person for such information is the Program Manager.

Management. A technical support contractor may assist the OJJDP Program Manager in managing the peer review process.

Oversight and Audit. An OJJDP Competition and Peer Review Oversight Coordinator shall: 1) oversee the competition and peer review process, and 2) obtain an annual independent assessment of the peer review selection process.

Compensation. All peer reviewers will be eligible to be paid an established fee: $150.00 per day. Reviewers shall not be paid for time spent in the preliminary review and rating of applications. PRG members shall be paid only for time spent in the conduct of PRG meetings. Mail reviewers shall be paid only for time spent preparing written evaluations of proposals. In addition, peer reviewers will be eligible for reimbursement for travel expenses, including per diem in lieu of subsistence, as authorized by Section 5703 of Title 5, United States Code.

Memorandum

Subject
Legal Principles Applicable to Determining Personal Liability of Directors of the National Partnership to Prevent Drug and Alcohol Abuse Among Youth

Date
October 17, 1986

To
Frank Porpotage
Program Manager
Special Emphasis Division, OJJDP

From
John J. Wilson
Associate General Counsel
OGC, OJP

This is in response to your request of September 26, 1986 for a legal memorandum regarding whether the individual Board members of the National Partnership can be held liable for decisions made by Partnership management. I presume that you are asking specifically about possible claims for costs incurred under the grant that may be disallowed by OJJDP in the future.

There follows a general survey of legal principles based on caselaw.

General Principles of Director Liability

As a general proposition, where a corporation is unable to, or fails to, pay its debts, directors are not personally liable even where the corporation is insolvent. This is consistent with the basic principle of agency law that an agent (director) is not responsible for acts done on behalf of the principal. Rather, the directors' primary duty is to administer the assets of the corporation for the benefit of its owners and creditors (Martin v. Chambers, 214 F. 769). Directors, then, are neither insurors nor guarantors of corporate debts.

However, there are certain circumstances under which directors may be held personally liable for corporate debts: e.g., where there is a constitutional, statutory or charter provision imposing liability; where directors have agreed by contract to be so bound; or where the director is found to be the alter-ego of the corporation; that is, where the interest and ownership are so closely united that, for all practical purposes, there is no distinction between the individual director and the corporation (Wittman v. Whittingham, 259 P. 63, 85 Cal. App. 140). The alter-ego theory is primarily applied in the case of a closely-held corporation.

Moreover, directors and officers may be held personally liable for corporate obligations if the corporation has been so defectively organized as to have neither de jure nor de facto existence (Baker v. Bates-Street Shirt Co., C.C.A. Me., 6 F.2d 854). Although the de facto existence of a corporation will generally excuse personal liability, directors have been held to be personally liable, despite their good faith efforts, where they contract debts in the name of a corporation which, for legal purposes, has not yet come into existence at all. This rule is consistent with the principle of agency law that he who acts as agent for a nonexisting or legally incompetent principal is personally liable to any person with whom the agent dealt who is ignorant of the facts (American Soap Co. v. Bogue, 152 N.E. 393, 20 Ohio App. 375). Also see §4:02, "Nonprofit Enterprises: Law and Taxation", attached.

Directors of Non-Profit Corporations

The officers and agents of a charitable corporation or association are bound by the general rules concerning the authority and responsibility of a fiduciary. Persons dealing with them must take notice - at their peril - of the powers granted to the charity by its articles of incorporation (Horton v. Tabitha Home, 145 N.W. 1023).

Misfeasance

The primary remedy for corporate creditors is found pursuant to statutory law rather than the common law. Many states have enacted statutes making directors personally liable for corporate damages or corporate debts. Most require that directors be found guilty of certain official neglect or misconduct, e.g., contracting for pre-incorporation debts, making excessive debts, or making a prohibited loan (see, e.g., Rubinstein v. Kaprzak, 124 A. 362, 2 N.J. Misc. 323).

Generally, these statutes are considered to be remedial and compensatory in nature as far as the interests of creditors are concerned. As such, the courts have generally held that the statutes should receive a broad, liberal construction (Broderick v. Marcus, 261 NYS 625). Where, however, a statute is construed to be penal in nature, courts have held that the statute must be strictly construed in favor of the individual(s) sought to be charged.

Moreover, the standard by which corporate directors/officers may be excused from liability is one of "substantial compliance" with the statute, e.g., overlooking a mere technical detail which does not affect the substance, and which is therefore not sufficient to impose liability.

Directors are liable only to the extent that a debt could be enforced against the corporation (see e.g., Knower v. Haines, 31 F. 513).

Officers and agents may be individually liable for injury resulting from their own acts or conduct, particularly if such injury results from their misfeasance rather than from nonfeasance (Pease v. Parsons, 173 N.E. 406, 273 Mass. 111). Such liability is determined by state statute. New York statute, for example, imposes on directors of charitable corporations the same liability imposed on stockholders, differing only in degree (Marsh v. Kaye, 61 N.E. 177, 168 N.Y. 196).

Duty to Exercise Due Care

The precise relations and duties of directors vary with the character of the particular corporation and the nature of its business, the understanding between the members of that corporation or the administrative practices approved by them, and the general usage in that type of corporate business. See §4:08, "Nonprofit Enterprises: Law and Taxation", attached.

Some cases compare directors to "mandatories", persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence - but no more. "One who voluntarily takes the position of director, and invites confidence in that relation, undertakes, like a mandatory, with those he represents, or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties." (Bosworth v. Allen, 168 N.Y.157, 61 N.E.163).

A lack of due care in making a decision which causes harm to a corporation can be actionable. However, directors may violate the duty of due care through lack of attention or failure to adequately supervise officers or employees. A claim based on failure to supervise generally involves an allegation that the directors failed in their duty to detect or prevent mismanagement by corporate officers or employees. Although widespread delegation of authority for day to day corporate affairs is permissable, such delegation does not relieve directors of their obligation to exercise due care in the supervision of officers or employees (Lowell Hoit & Co. v. Detig, 320 Ill App 179, 50 N.E.2d 602, 603 (1943)).

Directors' Responsibility to Have Knowledge of Corporate Activities

Directors are not personally liable for the acts or omisssions of corporate officers or employees merely by virtue of their position as directors. In order to establish liability, a plaintiff must show either that the director had knowledge of the wrongful act or that in the exercise of due care, the director should have been aware of circumstances demanding corrective action (Harman v. Willbern, 374 F Supp 1149,1163 (D Kan 1974)).

A lack of knowledge of wrongdoing is not an absolute defense. The law does not recognize a "figurehead" director. Thus, a director cannot close his eyes to what is going on around him in the conduct of the business of the corporation, and thereby avoid liability for failing to act. Directors are charged with knowledge of facts which they reasonably should have known or discovered in the discharge of their duties. A director is expected to attend director's meetings and to have a general knowledge of the financial condition of the company and of its system of management. The courts have found violations of the duty of due care where a director habitually failed to attend director's meetings and where a director did not pay the slightest attention to her duties and was unfamilier with information contained in the company's annual financial statements which would have alerted her to alleged fraud (Francis v. United Jersey Bank, 87 NJ 15, 432 A2d 814 (1981)).

A director is generally entitled to rely on the integrity of management if he has attended meetings and fulfilled his duty of attention, and if such reliance is reasonable under the circumstances. The extent to which reliance will be deemed reasonable will depend on the facts and circumstances of the particular case. The existance of facts which would arouse the suspicion of the ordinary prudent director will furnish the basis for liability of a director or officer who fails to make reasonable inquiries and act with due care regarding his suspicions (Preston-Thomas Const. Inc. v. Central Leasing Corp., 518 P2d 1125, 1127 (Okla Ct App 1973)).

Directors' Actions or Lack Thereof Must be the Proximate Cause of Loss or Damages

Even if a plaintiff can show that a director or officer violated a duty of due care, recovery will be denied unless the plaintiff can also show causation. The plaintiff must demonstrate that the proper performance of the officer's or director's duties would have avoided the loss (See Francis v. United Jersey Bank, supra).

In order to make a determination regarding potential liability of members of the Partnership Board of Directors, the details would have to be reviewed to determine the facts and the above legal principles applied. The degree of lack of due care of the directors and the element of causation for any actual loss would also have to be determined.

Comment

If a claim accrues against the Partnership and is unpaid, this office will work with OJJDP to conduct a review in accordance with the principles of this memorandum.

Please note that nothing contained in this memorandum should be construed to indicate a preliminary determination or view on the actual liability of Partnership board members for future claims against the Partnership.

Attachment

cc: Richard B. Abell, Acting Assistant Attorney General
Verne L. Speirs, Acting Administrator, OJJDP
Jack A. Nadol, Comptroller

CHAPTER 4

LIABILITY OF MEMBERS AND DIRECTORS

§ 4:01. Liability of Members.
§ 4:02. Legal Standards Determining Liability of Directors.
§ 4:03. General Duties of Trustees.
§ 4:04. General Duties of Corporate Directors.
§ 4:05. — Duty of Loyalty.
§ 4:06. — — Corporate Opportunity.
§ 4:07. — — Use of Inside Information.
§ 4:08. — Duty of Care.
§ 4:09. Standards Applicable to Nonprofit Enterprises.
§ 4:10. Statutory Law Relating to Liability of Directors.
§ 4:11. — Investment of Institutional Funds.
§ 4:12. — Indemnification of Officers and Directors.
§ 4:13. Checklist of Points To Remember.

§ 4:01. Liability of Members.

While directors of a corporation are liable for a breach of their management duties, because members of a nonprofit corporation do not manage the corporation, they generally are not subject to the potential liability problems that face directors.[1] The question of liability of members of a nonprofit organization normally arises regarding liability for debts or obligations of the organization. For those nonprofit organizations that are incorporated, members have immunity from personal liability.[2] This concept is a fundamental principle of the general law relating to corporations.[3]

The Model Nonprofit Corporation Act is silent regarding liability of members of a nonprofit corporation. However, a few states have provisions on the subject. For example, the California Nonprofit Corporation Law and the New Jersey Nonprofit Corporation Act provide that members of a nonprofit corporation are not personally liable for the debts, liabilities, or obligations of the corporation.[4] These provisions follow the common-law rule providing for immunity from liability for shareholders of corporations.

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[1] Controlling shareholders of a for-profit corporation often are subject to the same duties as corporate directors and, thus, are also liable for a breach of duties. See Fletcher Cyc Corp §838. However, nonprofit corporations would not normally have a separate class of "controlling" members.

[2] United States. Nettles v. Childs, 100 F2d 952 (CA4, 1939).

[3] Members of unincorporated nonprofit associations may be individually liable for debts and obligations of the association. See discussion at §§1:08, 12:01. This is a major reason why nonprofit organizations should be incorporated.

[4] See Cal Corp Code §§5350, 7350; NJ Stat Ann §15A:5-25.

§4:02. Legal Standards Determining Liability of Directors.

Directors of a nonprofit enterprise have a duty to manage the affairs of the organization so that its property will be used for the public purposes for which it was entrusted. However, there is no clear-cut body of law establishing the legal standards to be applied in determining the roles and responsibilities of directors. The charitable corporation is a relatively new legal entity that does not fit neatly into the established common-law categories of corporation or trust.[1] The Model Nonprofit Corporation Act and, thus, the statutes of many of the states that have adopted the Model Act are silent regarding liability for a breach of duty on the part of the directors.

As a general rule, a court will not interfere with the internal management of a nonprofit organization unless there is a willful abuse of the discretionary powers of the trustees or directors, or there is a neglect of duty or bad faith.[2] Trustees and corporate directors can be liable for losses caused by their negligent mismanagement of property and investments.[3] However, in determining whether negligence occurred, the standard and degree of care required differs in many states. There is a higher standard of care applicable to a trustee than to a corporate director.[4] Which standard applies to the director of a nonprofit corporation has not been clearly established.[5] The standards applicable to both trustees of private trusts and directors of business corporations are summarized to provide a background for a determination of the standards that should be applicable to trustees and directors of a nonprofit organization.[6]

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[1] **United States.** See Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries, 381 F Supp 1003 (D DC, 1974).

[2] See, e.g.:

Michigan. Ayres v. Hadaway, 303 Mich 589, 6 NW2d 905 (1942).

New York. Schrank v. Brown, 192 Misc 80, 80 NYS2d 452 (1942); Central New York Bridge Association, Inc. v. American Contract Bridge, Inc., 72 Misc 2d 271, 339 NYS2d 438 (1972).

Ohio. State v. Judges of Court of Common Pleas, 183 Ohio St 239, 181 NE2d 261 (1962).

[3] **United States.** See Stern v. Lucy Webb Hayes National School for Deaconesses and Missionaries, 381 F Supp 1003 (D DC, 1974).

[4] **United States.** Mann v. Commonwealth Bond Corp., 27 F Supp 315, 320 (SD NY, 1938).

[5] **United States.** Compare Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries, 381 F Supp 1003 (D DC, 1974) where the court held that directors of nonprofit corporations resembled directors of regular corporations and should be subject to the corporate standard rather than the more stringent standard governing trustees.

Massachusetts. See City of Boston v. Curley, 276 Mass 549, 177 NE 557 (1931) where the court was of the opinion that a court should look through the corporate form for a nonprofit organization and hold the members to the trustee standard. See also Wellesley College v. Attorney General, 313 Mass 722, 49 NE 2d 220 (1943).

Wisconsin. Old Settlors Club of Milwaukee, Inc v. Haun, 245 Wis 213, 13 NW2d 913 (1944).

[6] See §§4:03–4:08.

§4:03. General Duties of Trustees.

Once a trustee has accepted a trust, he or she must continue to administer the trust. A trustee can resign only with permission of the court or by the consent of the beneficiaries unless the trust instrument provides otherwise.[1] A trustee is liable for the trust property regardless of whether or not the trustee receives compensation.[2]

The most fundamental duty owed by a trustee to beneficiaries of the trust is the duty of loyalty.[3] The fiduciary relationship between the trustee and the beneficiaries of a trust is an especially intense one. The trustee must administer the trust solely in the interest of the beneficiaries; the trustee may not place himself in a position where it would be for his own benefit to violate the duty of loyalty.[4] When a trustee's personal interests come into conflict with his duty to beneficiaries of the trust, courts have fixed a high and strict standard for the trustee's conduct. The trustee's interest must yield to that of the beneficiaries.[5] In this regard, a transaction involving the trustee personally that was in all respects fair and reasonable might stand so long as the trustee dealt directly with the beneficiaries, made full disclosure, and did not take advantage of his position.[6] Should the trustee act without consent of the beneficiaries, however, the transaction will be set aside even though it was otherwise fair and reasonable.[7]

A purchase of trust property by a trustee individually, or a sale to the trust of the trustee's individual property, can be set aside no matter how fair the sale may have been.[8] A trustee violates his duty to the beneficiaries not only where he purchases trust property for himself individually but also where he has a personal interest in the purchase of such a substantial nature that it might affect his judgment in making the sale.[9]

A trustee is also subject to a duty of care. This requires that the trustee, in administering the trust, exercise the care and skill that a man of ordinary prudence would exercise in dealing with his own property.[10] This standard causes a trustee to be liable for acts of simple negligence.[11]

A trustee may not delegate to others the administration of the trust.[12] While the trustee need not personally perform every act that may be necessary in the execution of the trust, the trustee must remain the executive manager of the trust.[13] The trustee may not delegate the responsibility for managing the trust property or making trust investments.[14]

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[1] Scott, Law of Trusts § 169 (3d Ed).

[2] Scott, Law of Trusts § 169 (3d Ed).

[3] See Restatement (Second) of Trusts § 379. Self-dealing is prohibited. See Scott, Law of Trusts § 170 (3d Ed).

[4] Scott, Law of Trusts § 170 (3d Ed).

[5] **United States.** See Blankenship v. Doyle, 329 F Supp 1089 (D DC, 1971).

[6] Scott, Law of Trusts § 170.1 (3d Ed).

[7] Scott, Law of Trusts § 170.1 (3d Ed).

[8] The Uniform Trust Act § 5 forbids a trustee from directly or indirectly buying or selling any property from the trust, from or to himself, or from or to any relative, employee, partner, or other business associate.

[9] Scott, Law of Trusts § 170.10 (3d Ed).

[10] If a trustee has greater skill or more facilities than others, the trustee is under a duty to employ the greater skill and facilities. See Scott, Law of Trusts § 174 (3d Ed). In addition, if a trustee has represented himself as having a higher degree of skill or greater facilities than others possess, the trustee may incur a liability by failing to measure up to the standard he has set for himself. A person who induces another to employ him as a trustee by representing that he has special knowledge or special skill is held to the standard of skill which he represented himself to have. See Scott, Law of Trusts § 174 (3d Ed).

[11] Restatement (Second) of Torts § 174.

[12] See Scott, Law of Trusts § 171 (3d Ed).

See, e.g.:

Massachusetts. City of Boston v. Curley, 276 Mass 549, 177 NE 557 (1931).

New York. In re Hutchinson, 32 Misc2d 879, 224 NYS2d 438 (1962).

[13] Scott, Law of Trusts § 171 (3d Ed).

[14] Scott, Law of Trusts § 171.1-2 (3d Ed).

§4:04. General Duties of Corporate Directors.

While directors of corporations are also subject to a duty of loyalty and a duty of care to the corporation, the duties of directors are less stringent than those required of trustees.[1] The lesser standards have been applied to the corporate director based upon the theory that corporate directors have many areas of responsibility.[2] Trustees, on the other hand, are often said to be charged only with management of trust funds, and thus, can devote more time and expertise to the task.[3]

Despite the fact that corporate directors are held to lesser standards than are trustees, directors are nonetheless fiduciaries and continue to have a status similar to that of trustees.[4] A director must act for the benefit of members of the corporation, and, in the case of a nonprofit corporation, for the benefit of the public.[5]

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[1] **United States.** See Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries, 381 F Supp 1003 (D DC, 1974).

[2] **United States.** Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries, 381 F Supp 1003 (D DC, 1974).

[3] **United States.** Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries, 381 F Supp 1003 (D DC, 1974).

[4] **United States.** See Pepper v. Litton, 308 US 295, 84 L Ed 281, 60 S Ct 238 (1939).

See also Fletcher Cyc Corp § 838.

[8] See, e.g.:

United States. Christiansen v. National Savings and Trust Company, 683 F2d 520, 528 (CA DC, 1982). The fiduciary duties of a corporate director run to the corporation, however, and not directly to its members or the general public.

Georgia. Trustees of Jess P. Williams Hospital v. Nisbet, 181 Ga 821, 14 SE2d 64, 76 (1941).

Ohio. Haluka v. Baker, 66 Ohio App 308, 24 NE2d 68, 70 (1940).

§ 4:05. — Duty of Loyalty.

The duty of loyalty for a corporate director requires that a director not exploit corporate opportunities or misuse inside information.[1] Only reasonable salaries may be paid board members, and often directors serve without compensation.[2] A board member must account to the corporation for any profits received as a result of the directorship.[3]

A director may not obtain a private or secret profit as a result of his or her official position; the corporation must have the benefit of any advantage the director has acquired.[4]

The purchase or lease of corporate property by an officer or director is voidable, but not void, in contrast to the trust standard.[5] A director may assert a fairness defense to a charge of self-dealing.[6] However, such a transaction will be upheld only if it is indeed fair and was for a sufficient consideration.[7] The presumption in such cases generally is against validity. In addition, courts apply a more stringent test to determine fairness.[8]

A corporate director may not cast a vote upon a matter in which the director has an adverse interest.[9] However, there has been some support for the possibility that a vote of an interested director, while not necessarily valid, may be counted in favor of a transaction between the director and the corporation if the transaction appears to be fair and is characterized in good faith.[10]

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[1] Scott, Law of Trusts § 348.2 at 2780 (3d Ed).

Fletcher Cyc Corp § 861.1.

Brodsky & Adamski Corp Officers & Dir § 3:01.

See §§ 4:06, 4:07.

[2] See Fletcher Cyc Corp § 514.1.

[3] Scott, Law of Trusts § 170.2 at 1304–07.

New York. New York Trust Co. v. American Realty Co., 244 NY 209, 155 NE 102 (1926).

[4] **Illinois.** Flynn v. Zimmerman, 231 Ill App 2d 467, 163 NE2d 568 (1960).

Missouri. Knox Glass Bottle Company v. Underwood, 228 Miss 699, 89 So 2d 799 (1956), cert den, 353 US 977 (1957).

[5] **North Carolina.** Mountain Top Youth Camp, Inc. v. Lyon, 20 NC App 694, 202 SE2d 498 (1974).

[6] **Delaware.** Johnson v. Greene, 35 Del Ch 479, 121 A2d 919 (1956).

Texas. Wiberg v. Gulf Coast Land & Development, 360 SW2d 563 (Tex Civ App 1962).

[7] **Wyoming.** See Voss Oil Company v. Voss, 367 P2d 977 (1962).

[8] **Arkansas.** Geominerals Corporation v. Grace, 232 Ark 524, 338 SW2d 935 (1960).

Delaware. Alcott v. Hyman, 42 Del Ch 233, 208 A2d 501 (1965).

[9] **Illinois.** Weiss Medical Complex v. Kim, 87 Ill App 3d 111, 408 NE2d 959 (1980).

Utah. Davis v. Health Development Company, 558 P2d 594 (1976).

[10] **Delaware.** Sterling v. Mayflower Hotel Corporation, 33 Del Ch 293, 93 A2d 107 (1952).

Massachusetts. Spiegel v. Beacon Participations, Inc, 297 Mass 398, 8 NE2d 895 (1937).

New York. In re Burkin, 1 NY2d 570, 136 NE2d 862 (1956).

§4:06. ——Corporate Opportunity.

A corporate director is under a fiduciary obligation not to divert a corporate business opportunity for his or her own personal gain.[1] This so-called doctrine of corporate opportunity is a species of the duty of a fiduciary to act with undivided loyalty to the corporation. The doctrine charges any interest acquired by the director with a trust for the benefit of the corporation.[2] The theory is that an insider should not use his inside position to benefit himself by seizing an investment opportunity available to and suitable for the corporation. It operates because the corporation was not given the opportunity to engage in the transaction.[3]

If a business opportunity comes to a corporate director in his individual capacity rather than his official capacity, however, and the opportunity is one which is not essential to the corporation and in which it has no interest or expectancy, the director is entitled to treat the opportunity as his own.[4] The test in determining whether a corporate officer has appropriated a corporate opportunity is whether there was a specific duty on the part of the director to act or contract in regard to the particular matter as the representative of the corporation.[5]

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[1] See Fletcher Cyc Corp § 861.1; Brodsky & Adamski, Corp Officers & Dir ch 4.

[2] See, e.g.:

Massachusetts. Durfee v. Durfee & Canning, Inc, 323 Mass 187, 80 NE2d 522 (1948).

New York. Turner v. American Metal Co, 36 NYS2d 356 (1942); Litwin v. Allen, 25 NYS2d 667 (1940).

Ohio. Hubbard v. Pape, 2 Ohio App 2d 326, 203 NE2d 365 (1964).

Pennsylvania. Zampetti v. Cavanaugh, 3406 Pa 259, 176 A2d 906 (1962).

Wisconsin. General Automotive Manufacturing Co. v. Singer, 19 Wis 2d 528, 120 NW2d 659 (1963).

[3] See Fletcher Cyc Corp § 861.1.

[4] See, e.g.:

Delaware. Equity Corporation v. Milton, 42 Del Ch 425, 221 A2d 494 (1966); Johnston v. Greene, 35 Del Ch 479, 121 A2d 919 (1956).

Indiana. Tower Recreation, Inc. v. Beard, 141 Ind App 649, 231 NE2d 154 (1967).

Minnesota. Miller v. Miller, 301 Minn 207, 222 NW2d 71 (1974).

Pennsylvania. Dravosburg Land Co. v. Scott, 340 Pa 280, 16 A2d 415 (1940).

[5] **Illinois.** Northwestern Terra Cotta Corporation v. Wilson, 74 Ill App 2d 38, 219 NE2d 860 (1966).

Kentucky. Urban J. Alexander Company v. Trinkle, 311 Ky 635, 224 SW2d 923 (1949).

Massachusetts. Black v. Parker Manufacturing Company, 329 Mass 105, 106 NE2d 544 (1952).

Missouri. Franco v. J D Streett & Company, 360 SW2d 597 (Mo, 1962).

Pennsylvania. Robinson v. Brier, 412 Pa 255, 194 A2d 204 (1963).

§ 4:07. ——Use of Inside Information.

The law relating to a corporate director's duty regarding use of inside information is ill-defined. Under some state law and under federal law, it is a higher duty, resembling the duty of a trustee.[1]

For for-profit corporations, federal statutes provide that directors and shareholders with at least 10% ownership must return to the corporation all profits derived from sales and purchases or purchases and sales of equity securities of the corporation within a six month period.[2] Liability attaches regardless of the intention of the insider.[3] While this rule generally is not a part of state law, some states have adopted the concept.[4]

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[1] See Securities Exchange Act of 1934, §§10b, 16(b); 15 USC §§78j(b), 78p.

[2] Securities Exchange Act of 1934 §16(b); 15 USC §78p.

[3] **United States.** See National Medical Enterprises v. Small, 680 F2d 83 (CA9, 1982).

[4] See, e.g.:

California. Black v. Shearson, Hammill and Company, 266 Cal App 2d 362, 72 Cal Rptr 157 (1968).

Delaware. Brophy v. Cities Service Company, 31 Del Ch 241, 70 A2d 5 (1949).

New York. Diamond v. Oreamuno, 24 NY2d 494, 248 NE2d 910 (1969). In the Diamond case, the New York court held that the inside information of a corporate officer or director is an asset of the corporation, acquired by the insider as a fiduciary of the company. The court held that a misappropriation of such information is a violation of that trust. The New York court quoted the well-established rule that a person who acquires special knowledge or information by virtue of his fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit but must account to his principal for any profits derived therefrom. The court then likened a corporate director to a trustee in this regard and stated that "just as a trustee has no right to retain for himself the profits yielded by property placed in his possession but must account to his beneficiaries, a corporate fiduciary, who is entrusted with potentially valuable information, may not appropriate that asset for his use even though, in so doing, he causes no injury to the corporation."

But see, e.g.:

Florida. Schein v. Chasen, 313 So 2d 639 (1975); Schein v. Lum's, Inc., 519 F2d 453 (CA2, 1975). The Florida court refused to extend what it termed the "innovative ruling" of the New York court in Diamond to someone who gave a tip of insider information. It stated that the Diamond doctrine applied only to corporate fiduciaries who actually profit by insider information and should not cover inside aiders, abettors, or conspirators. The court commented that the Diamond rule was a significant alteration of the common law principles applicable to directors.

Indiana. Freeman v. Decio, 584 F2d 186 (CA7, 1978). An Indiana court refused to permit a suit by shareholders against corporate officers and directors for alleged illegal trading of corporate stock on the basis of material insider information. The Indiana court was of the opinion that it would be better to determine whether there was any potential loss to the corporation from the use of insider information before deciding to characterize insider information as an asset with respect to which the insider owes the corporation a duty of loyalty. According to the Indiana court, a court should look first as to whether there was a possibility of a loss to the corporation before it held the director accountable to the corporation.

§ 4:08. —Duty of Care.

The duty of care requires that directors exercise reasonable skills in the exercise of their responsibilities.[1] A director should exercise the same care and skill which an ordinarily prudent person would exercise under similar circumstances in his or her own personal affairs.[2] While this duty is similar to that of a trustee, a corporate director has broader discretion than does a trustee. A director may delegate to officers or to committees the operation of the corporation.[3] Further, courts have stated that while directors are liable for negligence in the performance of their duties, they are not insurers and thus are not liable for errors of judgment or for mistakes so long as they act with reasonable skill and prudence.[4]

The liability of corporate directors for damages caused by negligent or unauthorized acts rests upon the common law rule that renders every agent liable who violates his authority or neglects his duty to the damage of his principal.[5] By accepting the office, directors implicitly undertake to give their best judgment to the enterprise.[6] The acceptance of the office of director implies a knowledge of the duties assumed. Directors will not be excused because of their lack of experience or ability.[7] However, directors are not responsible for mere errors of judgment or want of care short of clear and gross negligence.[8]

Directors are entitled to some protection for their negligent acts when they act under advice of counsel.[9] However, where the terms of their powers are explicit, advice of counsel is of no avail.[10]

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[1] See Henn & Alexander, Law of Corporations § 234 (3d Ed).

[2] See Brodsky & Adamski Corp Officers & Dir § 2:01.

[3] See Brodsky & Adamski Corp Officers & Dir § 2:01.

[4] This is called the "business judgment" rule.

United States. See discussion of the rule in Financial Industrial Fund, Inc., v. McDonnell Douglas Corporation, 474 F2d 514 (CA10, 1973); Herald

Company v. Seawell, 472 F2d 1081 (CA10, 1972); Panter v. Marshall Field & Company, 646 F2d 271 (CA7, 1981).

See also, e.g.:

Delaware. Olson Brothers v. Englehart, 42 Del Ch 348, 211 A2d 610 (1965).

Illinois. Shlensky v. Wrigley, 95 Ill App 2d 173, 237 NE2d 776 (1968).

Pennsylvania. Wolf v. Fried, 473 Pa 26, 373 A2d 734 (1977).

[5] **United States.** See Robinson v. Linfield College, 42 F Supp 147 (D Wash, 1941), affd 136 F2d 805 (CA9, 1943).

[6] See Lewis, The Business Judgment Rule and Corporate Directors' Liability for Mismanagement, 22 Baylor L Rev 157 (1970).

Delaware. Bennett v. Propp, 41 Del Ch 14, 187 A2d 405 (1962).

New York. Walker v. Man, 142 Misc 177, 253 NYS 458 (1931).

[7] **California.** Minton v. Cavaney, 56 Cal 2d 576, 364 P2d 473 (1961).

Tennessee. Neese v. Brown, 218 Tenn 686, 405 SW2d 577 (1964).

[8] **Delaware.** Cheff v. Mathes, 41 Del Ch 494, 199 A2d 548 (1964).

New York. Hornstein v. Paramount Pictures Inc., 292 NY 468, 55 NE2d 740 (1944).

[9] **United States.** Spirt v. Bechtel, 232 F2d 241 (CA2, 1956).

Louisiana. Pool v. Pool, 22 So 2d 131 (La App, 1945).

The New Jersey Nonprofit Corporation Act provides that a trustee of a nonprofit corporation will not be liable if he or she, in good faith, relies on the advice of counsel for the corporation or upon written reports setting forth the financial data concerning the corporation and prepared by independent certified public accountants or upon financial statements presented to them as being correct by officers of the corporation. NJ Stat Ann § 15A:6-14.

[10] **New York.** People v. Marcus, 261 NY 268, 185 NE 97 (1933).

§4:09. Standards Applicable to Nonprofit Enterprises.

To apply fiduciary standards to directors or trustees of nonprofit enterprises involves an analysis of the type of nonprofit organization. A charitable trust is generally subject to trust standards.[1] The nonprofit corporation that, while nonprofit, is not charitable in nature, is governed by corporate standards. However, the charitable nonprofit corporation presents a dilemma because it is much the same as the charitable trust.

There is a question whether different standards should be applied to the charitable trust and the charitable corporation simply because of a difference in organizational structure.[2] For example, should all self-dealing be prohibited in a charitable organization, applying the trust standard, or should only harmful self-dealing be prohibited, applying the corporate standard?[3] The Internal Revenue Code provisions applicable to private foundations cause charitable organizations that are private foundations to be subject to the trust standard regardless of organization structure.[4] All self-dealing for private foundations is prohibited.[5] The public charity, on the other hand, is not subjected to the self-dealing provisions applicable to private foundations.[6] However, again, the distinction is not organizational structure, but whether or not the organization is publicly oriented.

The current trend is to apply corporate rather than trust principles in determining the legal liability of directors of charitable corporations based on the concept that their functions are virtually indistinguishable from those of their "pure" corporate counterparts.[7] Some states have solved the problem by statutory law that prescribes the legal standards and liability of directors of nonprofit organizations.[8]

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[1] Scott, Law of Trusts § 379 (3d Ed).

[2] See Duties of Charitable Trust Trustees and Charitable Corporation Directors, 2 Real Prop Prob & Tr J 545 (1967).

[3] See The Fiduciary Duties of Loyalty and Care Associated with the Directors and Trustees of Charitable Organizations, 64 Va L Rev 449, 457 (1978).

[4] See discussion in Chapter 10.

[5] See § 10:04.

[6] See discussion of public charities in Chapter 9.

[7] **New Jersey.** Midlantic National Bank v. Frank G. Thompson Foundation, 405 A2d 866 (1979).

See e.g.:

United States. Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries, 381 F Supp 1003, 1013 (D DC, 1974).

There is disagreement with this concept. The corporate standard may be too lax. Directors of nonprofit corporations are not subjected to supervision by shareholders having access and direct interest in the corporate records. They often represent the general public and, thus, there is often no one to bring suit for breach of fiduciary duties. The right to sue for breach of duties generally is given the state's Attorney General who seldom has an interest in enforcing corporate duties. Some have advocated that there should be a flat prohibition on all self-dealing involving controlling persons in nonprofit organizations. See Hansmann, Reforming Nonprofit Corporation Law, 129 U Pa L Rev 4987 (1981).

Illinois. See Scott v. George F. Harding Museum, 58 Ill App 3d 408, 374 NE2d 756 (1978); People ex rel. Scott v. Silverstein, 86 Ill App 3d 605, 408 NE2d 243 (1980) for application of Charitable Trust Act to an incorporated museum.

See discussion at § 4:10.

§ 4:10. Statutory Law Relating to Liability of Directors.

Some states have sought to clarify the standards applicable to trustees and directors of nonprofit organizations by specific statutory provisions determining the standards.[1] These provisions, for the most part, have adopted the corporate standard rather than the more restrictive trust standard.[2]

New York's Not-for-Profit Corporation Law provides that directors and officers must discharge their duties in good faith and with that degree of diligence, care and skill that an ordinarily prudent man would exercise under similar circumstances in like positions.[3] Directors are specifically held liable if they vote for or concur in certain enumerated corporate actions, such as wrongfully distributing the corporate assets to members, directors or officers.[4] The provisions follow those of the New York Business Corporation Law and, thus, provide the standard of care of the corporate director.[5] Action to enforce the duty of care and the liability of directors and officers may be brought by the corporation itself through a director, receiver, trustee in bankruptcy, judgment creditor or a member in a derivative action, or by the Attorney General.[6]

California's Nonprofit Corporation Law has extensive provisions relating to the standards of conduct for corporate directors.[7] A director is to perform the duties of a director in good faith and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.[8] While self-dealing can cause a director to be liable to the corporation, transactions that were fair and reasonable as to the corporation at the time the corporation entered into the transactions, and transactions approved in good faith by a vote of a majority of the directors without counting the vote of the interested director and with knowledge of the material facts concerning the transactions and the director's interest, will not be set aside.[9] In addition, interested directors may be counted in determining the presence of a quorum at a meeting of the board to approve or ratify such a contract or transaction.[10]

Pennsylvania's Corporation Not-for-Profit Code provides that no contract or transaction between a nonprofit corporation and one or more of its members, directors or officers or between the nonprofit corporation and a business organization in which a director, member or officer has a financial interest, is void or voidable solely because the interested director, member, or officer was present at or participated in the meeting of the board that authorized the contract or transaction.[11] This is the case even if the interested director's vote was counted so long as the material facts as to the relationship of the officer in the transaction were disclosed or known to the board and the board in good faith authorized the contract or transaction by the affirmative votes of a majority of disinterested directors. This is permitted even though the disinterested directors were less than a quorum.[12]

In New Jersey, directors, called trustees, are relieved of liability if they relied in good faith upon opinion of counsel for the corporation or upon written reports setting forth financial data of the corporation prepared by independent public accountants or books of accounts or reports of the corporation represented to them to be correct by the corporation officers.[13]

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[1] See Cal Corp Code §§5230–5237, 7230–7238; NY Not-for-Profit Corp Law, §§717, 719, 710; NJ Stat Ann §15A:6–14 and Pa Stat Ann §7728.

[2] However, see Pa Stat Ann §7549 which provides that, for any property vested in trust in a corporation, the directors are held to the same degree of responsibility and accountability as if they were trustees of an unincorporated organization. Property committed to charitable purposes may not be diverted to other purposes except by court order.

[3] NY Not-for-Profit Corp Law §717.

[4] NY Not-for-Profit Corp Law §719.

[5] See NY Bus Corp Law §717.

[6] NY Not-for-Profit Corp Law §720.

[7] Cal Corp Code §§5230–5237, 7230–7238.

[8] Cal Corp Code §§5231, 7231.

[9] Cal Corp Code §§5233, 7233.

[10] Cal Corp Code §§5523(g), 7234.

[11] Pa Stat Ann §7728(a).

[12] Pa Stat Ann §7728(a).

[13] NJ Stat Ann § 15A:6-14.

New Jersey. Case law in New Jersey has applied corporate standards to nonprofit organizations. See Leeds v. Harrison, 7 NJ Super 558, 72 A2d 371 (1950); Stoolman v. Camden County Council Boy Scouts of America, 77 NJ Super 129, 185 A2d 436 (1962); Midlantic National Bank v. Frank G. Thompson Foundation, 170 NJ Super 128, 405 A2d 866 (1979).

In Leeds v. Harrison, 7 NJ Super 558, 72 A2d 371 (1950), the New Jersey court stated that the same rights and liabilities exist between the trustees of a nonprofit corporation and the members as exist between the directors and stockholders of a corporation for profit.

§4:11. —Investment of Institutional Funds.

A number of states have adopted the Uniform Management of Institutional Funds Act which provides a standard of business care and prudence in the investment of funds of certain nonprofit organizations.[1] The act authorizes the delegation of investment decisions and provides for the expenditure of the appreciation of invested funds.[2] The standard of care is that of a reasonable and prudent director of a nonprofit corporation—similar to that of a director of a business corporation.[3]

Drafters of the act adopted corporate standards based upon their assumption that corporate standards are more appropriate than trustee standards.[4] The drafters expressed concern that fear of liability from use of the trustee standard could have a debilitating effect upon members of a governing board of a nonprofit corporation, most of whom would be uncompensated public minded citizens.[5]

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[1] See, e.g.:

Cal Civ Code §§2290.1–2290.12; Colo Rev Stat §§15–1–1101 to 15–1–1109; Conn Gen Stat Ann §§45–100h to 45–100p; Del Code Ann, ch 12 §§4701–4708; Kan Stat Ann §§58–35601 to 58–2–3610; Ky Rev Stat §§273.510 to 273.590; La Rev Stat Ann §§9.2337.1 to 9.2337.8; Minn Stat Ann §§309.62 to 309.71; NJ Stat Ann §15:18–1–15 to 15:18–24; Ohio Rev Code Ann §§1715.51 to 1715.59; RI Gen Laws §§18–12–1 to 18–12–9; Tenn Code Ann §§35–1101 to 35–1109; Vt Stat Ann tit 14, §§3401–3407; Wash Rev Code §§24.44.010 to 24.44.900; Wis Stat Ann §112.10.

[2] Uniform Management of Institutional Funds Act §§2, 5.

[3] Uniform Management of Institutional Funds Act §6.

New Jersey. See Midlantic National Bank v. Frank G. Thompson Foundation, 405 A2d 866 (1979) wherein the New Jersey Supreme Court noted that one of the purposes of the Uniform Management of Institutional Funds was to enable governing bodies of charitable corporations to avoid the nondelegable principles normally applicable to trustees.

[4] See Uniform Management of Institutional Funds Act §6, Commissioners' Comment.

[5] See Uniform Management of Institutional Funds Act, Commissioners' Prefatory Note.

§4:12. —Indemnification of Officers and Directors.

While the expenditure of reasonable sums to defend a suit brought against a nonprofit organization has been held to be an expenditure for the carrying on of the ordinary business of the organization,[1] the payment of attorneys' fees to defend directors of a nonprofit corporation prior to a determination that the directors were not guilty of negligence or misconduct in the performance of their duties has been held to be an unauthorized transfer of funds of the corporation, not in conformity with the nonprofit purposes for which the corporation was formed.[2]

There is no common law right of indemnification for corporate directors.[3] Any such right is statutory. Consequently, a few states have added provisions providing for indemnification of directors for liability for damages and for expenses to defend an action brought against the director.[4]

New York's Not-for-Profit Corporation Law provides for indemnification of directors or officers of a nonprofit organization but also provides that provision may not be made to indemnify directors or officers in the certificate of incorporation, the bylaws, or by resolution of members or agreement, unless consistent with statutory provisions.[5] The statute provides that a nonprofit corporation may indemnify any person made a party to an action to procure a judgment for the corporation, for reasonable expenses, including attorneys' fees, but any settlement must be approved by a court.[6] In other cases, officers and directors may be indemnified if they acted in good faith.[7] The statute also permits a corporation to purchase insurance to indemnify the corporation for expenses in connection with indemnification of the directors or officers.[8]

California statutes provide for indemnification of any person who is a party or is threatened to be made a party to a lawsuit as an agent of the corporation if the person acted in good faith.[9] As in the New York statute, any provision for indemnification in the articles, bylaws, resolution, or agreement, must be consistent with the statute on indemnification.[10] A corporation may purchase and maintain insurance on behalf of any corporate agent against any liability asserted against the agent except acts of self-dealing.[11]

Texas statute provides that a corporation may indemnify any director or officer of a nonprofit corporation except in relation to matters in which the director or officer has been guilty of negligence or misconduct.[12] If a corporation has not fully indemnified an officer or director, a court may assess indemnity against the corporation for reasonable expenses plus attorneys' fees, provided that the person indemnified was not guilty of negligence or misconduct.[13]

For a charitable organization that is a private foundation for income tax purposes,[14] indemnification of officers or directors may be a prohibited act of self-dealing.[15]

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[1] **Texas.** Ex parte Edman, 609 SW2d 532 (1980).

[2] **New York.** Diamond v. Diamond, 307 NY 263, 120 NE2d 819 (1954).

Texas. Texas Society v. Fort Bend Chapter, 590 SW2d 156 (Tex Civ App, 1979).

[3] **Texas.** Texas Society v. Fort Bend Chapter, 590 SW2d 156 (Tex Civ App, 1979).

For an excellent discussion of indemnification of officers and directors of corporations see Bishop Law of Corporate Officers & Directors: Indemnification & Insurance.

[4] See, e.g., Cal Corp Code §§5238, 7237; NY Not-for-Profit Corp Law §§721–727; Pa Stat Ann tit 15, §7511; Tex Civ Stat §1396–2.22.

See Bishop Law of Corporate Officers & Directors: Indemnification & Insurance for a discussion of state statutes on indemnification of officers and directors of for-profit corporations.

See also Brodsky & Adamski Corp Officers & Dir §§19:02–19:06.

[5] NY Not-for-Profit Corp Law §721.

[6] NY Not-for-Profit Corp Law §722.

[7] NY Not-for-Profit Corp Law §723.

[8] NY Not-for-Profit Corp Law §727.

[9] Cal Corp Code §§5238, 7237.

[10] Cal Corp Code §§5238(g), 7237(g).

[11] Cal Corp Code §§5238(i), 7237(i).

[12] Tex Civ Stat §1396–2.22.

[13] Tex Civ Stat §1396–2.22.

[14] See definition and discussion of private foundations in Chapter 10.

[15] See discussion at §10:06. See specifically §10:06, n 44.

§4:13. Checklist of Points To Remember.

—1. Members of nonprofit organizations have immunity from personal liability for debts or obligations of the organization.[1]

—2. Generally, a court will not interfere with the internal management of a nonprofit organization unless there is a willful abuse of the discretionary powers of the directors or there is a neglect of duty or bad faith.[2] In determining whether any negligence on the part of the directors occurred, the standard and degree of care required of directors differs in many states.[3]

—3. There is a higher standard of care applicable to a trustee than to a corporate director.[4] Most states apply the standards applicable to corporate directors to directors of nonprofit organizations.[5]

—4. Corporate directors may delegate the operation of the corporation to officers or to committees.[6] Trustees may not do so.[7]

—5. Corporate directors are not responsible for mere errors of judgment or for want of care short of clear and gross negligence.[8]

—6. The duty of loyalty for a corporate director requires that a director not exploit corporate opportunities or misuse inside information. A director may not obtain a private or secret profit as a result of his or her official position.[9]

—7. The purchase or lease of corporate property by a director is voidable, not void, in contrast to the trust standard.[10]

—8. A corporate director may not cast a vote on a matter in which the director has an adverse interest.[11]

—9. In some cases, reliance of advice of counsel or upon financial records prepared by independent certified public accountants protects a director from liability.[12]

—10. A number of states have adopted the Uniform Management of Institutional Funds Act which authorizes the delegation of investment decisions for nonprofit corporations.[13]

—11. A few states have added provisions providing for indemnification of directors for liability for damages and for expenses to defend an action brought against the director.[14]

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[1] See § 4:01.
[2] See § 4:02.
[3] See § 4:02.
[4] See § 4:02.
[5] See §§ 4:09 and 4:10.
[6] See § 4:08.
[7] See § 4:03.
[8] See § 4:08.
[9] See § 4:05.
[10] See § 4:05.
[11] See § 4:05.
[12] See § 4:08.
[13] See § 4:11.
[14] See § 4:12.

APPENDIX B
DEPARTMENT OF JUSTICE STANDARDS OF CONDUCT

PART 45—STANDARDS OF CONDUCT

Sec.

45.735-1 Purpose and scope.
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APPENDIX—CODE OF ETHICS FOR GOVERNMENT SERVICE

AUTHORITY: 80 Stat. 379; 5 U.S.C. 301, Reorganization Plan No. 2 of 1950, 64 Stat. 1261; 3 CFR 1949-1953 Comp., E.O. 11222; 3 CFR, 1964-1965 Comp.; 3 CFR Part 735, unless otherwise noted.

SOURCE: Order No. 350-65, 30 FR 17202, Dec. 31, 1965, unless otherwise noted.

CROSS REFERENCE: For Attorney General's "Memorandum Regarding the Conflict of Interest Provisions of Pub. L. 87-849", see the appendix to this part.

§ 45.735-1 Purpose and scope.

(a) In conformity with sections 201 through 209 of Title 18 of the United States Code (as enacted by Pub. L. 87-849) and other statutes of the United States, and in conformity with Executive Order No. 11222 of May 8, 1965, and Title 5, Chapter I, Part 735, of the Code of Federal Regulations, relating to conflicts of interest and ethical standards of behavior, this part prescribes policies, standards and instructions with regard to the conduct and behavior of employees and former employees (as defined in § 45.735-3 (b) and (d) respectively) of the Department of Justice.

(b) This part, among other things, reflects prohibitions and requirements imposed by the criminal and civil laws of the United States. However, the paraphrased restatements of criminal and civil statutes contained in this part are designed for informational purposes only and in no way constitute an interpretation or construction thereof that is binding upon the Department of Justice or the Federal Government. Moreover, this part does not purport to paraphrase or enumerate all restrictions or requirements imposed by statutes, Executive orders, regulations or otherwise upon Federal employees and former Federal employees. The omission of a reference to any such restriction or requirement in no way alters the legal effect of that restriction or requirement and any such restriction or requirement, as the case may be, continues to be applicable to employees and former employees in accordance with its own terms. Furthermore, attorneys employed by the Department should be guided in their conduct by the Code of Professional Responsibility of the American Bar Association. Interpretations and applications of the Code to an attorney's official duties should be obtained pursuant to § 45.735-2(e).

(c) Any violation of any provision of this part shall make the employee involved subject to appropriate disciplinary action which shall be in addition to any penalty which might be prescribed by statute or regulation.

[Order No. 350-65, 30 FR 17202, Dec. 31, 1965, as amended by Order No. 960-81, 46 FR 52357, Oct. 27, 1981]

§ 45.735-2 Basic policy.

Employees shall:

(a) Conduct themselves in a manner that creates and maintains respect for the Department of Justice and the U.S. Government. In all their activities, personal and official, they should always be mindful of the high standards of behavior expected of them;

(b) Employees should discuss with their immediate supervisors any problems concerning ethics or professional conduct that they cannot resolve personally by reference to the standards set forth in this part. Supervisors should ascertain all pertinent information bearing upon any such problem coming to their attention and shall take prompt action to see that problems that cannot be readily resolved are submitted to the Assistant Attorney General or other official in charge of the employees' Office, Board or Division. In the case of personnel employed by the United States Attorneys, problems may be referred to the Director of the Executive Office for United States Attorneys.

[Order No. 350-65, 30 FR 17202, Dec. 31, 1965, as amended by Order No. 960-81, 46 FR 52358, Oct. 27, 1981]

§ 45.735-3 Definitions.

(a) *Division.* "Division" means a principal component of the Department of Justice, including a division, bureau, service, office or board.

(b) *Employee.* "Employee" means an officer or employee of the Department of Justice and includes a special Government employee (as defined in paragraph (c) of this section) in the absence of contrary indication. Presidential appointees shall be deemed employees for the purposes of this part. In situations in which this part requires an employee to report information to, or seek approval for certain activities from, the head of a division, an employee who is the head of a division or who is an appointee of the Attorney General not assigned to a division, shall report to, or seek approval from, the Deputy Attorney General, and the Deputy Attorney General shall report to, or seek approval from, the Attorney General.

(c) *Special Government employee.* "Special Government employee" means an officer or employee of the Department of Justice who is retained, designated, appointed, or employed to perform, with or without compensation, for not more than 130 days during any period of 365 consecutive days, temporary duties either on a full-time or intermittent basis.

(d) *Former employee.* "Former employee" means a former Department of Justice employee or former special Government employee, as defined in paragraph (c) of this section.

(e) *Person.* "Person" means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, or any other organization or institution.

[Order No. 350-65, 30 FR 17202, Dec. 31, 1965, as amended by Order No. 686-77, 42 FR 15315, Mar. 21, 1977; Order No. 960-81, 46 FR 52358, Oct. 27, 1981]

§ 45.735-4 Disqualification arising from personal or political relationship.

(a) Unless authorized under paragraph (b) of this section, no employee shall participate in a criminal investigation or prosecution if he has a personal or political relationship with:

(1) Any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution; or

(2) Any person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.

(b) An employee assigned to or otherwise participating in a criminal investigation or prosecution who believes that his participation may be prohibited by paragraph (a) of this section shall report the matter and all attendant facts and circumstances to his supervisor at the level of section chief or the equivalent or higher. If the supervisor determines that a personal or political relationship exists between the employee and a person or organization described in paragraph (a) of this section, he shall relieve the employee from participation unless he determines further, in writing, after full consideration of all the facts and circumstances, that:

(1) The relationship will not have the effect of rendering the employee's

service less than fully impartial and professional; and

(2) The employee's participation would not create an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution.

(c) For the purposes of this section:

(1) "Political relationship" means a close identification with an elected official, a candidate (whether or not successful) for elective, public office, a political party, or a campaign organization, arising from service as a principal adviser thereto or a principal official thereof; and

(2) "Personal relationship" means a close and substantial connection of the type normally viewed as likely to induce partiality. An employee is presumed to have a personal relationship with his father, mother, brother, sister, child and spouse. Whether relationships (including friendships) of an employee to other persons or organizations are "personal" must be judged on an individual basis with due regard given to the subjective opinion of the employee.

(d) This section pertains to agency management and is not intended to create rights enforceable by private individuals or organizations.

[Order No. 993-83, 48 FR 2319, Jan. 19, 1983]

§ 45.735-5 Disqualification arising from private financial interests.

(a) No employee shall participate personally and substantially as a Government employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest, unless authorized to do so in accordance with the following described procedure:

(1) The employee shall inform the head of his division of the nature and circumstances of the matter and of the financial interest involved and shall request a determination as to the propriety of his participation in the matter.

(2) The head of the division, after examining the information submitted, may relieve the employee from participation in the matter, or he may submit the matter to the Deputy Attorney General with recommendations for appropriate action. In cases so referred to him, the Deputy Attorney General may relieve the employee from participation in the matter or may approve the employee's participation in the matter upon determining in writing that the interest involved is not so substantial as to be likely to affect the integrity of the services which the Government may expect from such employee.

(b) The financial interests described below are hereby exempted from the prohibition of 18 U.S.C. 208(a) as being too remote or too inconsequential to affect the integrity of an employee's services in a matter:

The stock, bond, or policy holdings of an employee in a mutual fund, investment company, bank or insurance company which owns an interest in an entity involved in the matter, provided that in the case of a mutual fund, investment company or bank the fair value of such stock or bond holding does not exceed 1 percent of the value of the reported assets of the mutual fund, investment company, or bank.

(18 U.S.C. 208)

[Order No. 350-65, 30 FR 17202, Dec. 31, 1965, as amended by Order No. 698-77, 42 FR 15315, Mar. 21, 1977; Order No. 960-81, 46 FR 52355, Oct. 27, 1981]

§ 45.735-6 Activities and compensation of employees in claims against and other matters affecting the Government.

(a) No employee, otherwise than in the proper discharge of his official duties, shall—

(1) Act as agent or attorney for prosecuting any claim against the United States, or receive any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim;

(2) Act as agent or attorney for anyone before any department, agency, court, court-martial, office, or any civil, military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter in which the United States is a party or has a direct and substantial interest; or

(3) Directly or indirectly receive or agree to receive, or ask, demand, solicit or seek, any compensation for any services rendered or to be rendered either by himself or another, before any department, agency, court, court-martial, officer, or any civil, military, or naval commission, in relation to any matter enumerated and described in paragraph (a)(2) of this section.

(b) A special Government employee shall be subject to paragraph (a) of this section only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially as a Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or (2) which is pending in the Justice Department: *Provided*, That paragraph (b)(2) of this section shall not apply in the case of a special Government employee who has served in the Justice Department no more than 60 days during the immediately preceding period of 365 consecutive days.

(c) Nothing in this part shall be deemed to prohibit an employee, if it is not otherwise inconsistent with the faithful performance of his duties, from acting without compensation as agent or attorney for any person in a disciplinary, loyalty, or other Federal personnel administration proceeding involving such person.

(d) Nothing in this part shall be deemed to prohibit an employee from acting, with or without compensation, as agent or attorney for his parents, spouse, child, or any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other personal fiduciary, except in those matters in which he has participated personally and substantially as a Government employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which are the subject of his official responsibility, as defined in section 202(b) of Title 18 of the United States Code, provided that the head of his division approves.

(e) Nothing in this part shall be deemed to prohibit an employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt.

(18 U.S.C. 203, 205)

§ 45.735-7 Disqualification of former employees; disqualification of partners of current employees.

(a) No individual who has been an employee shall, after his employment has ceased, knowingly act as agent or attorney for, or otherwise represent, any other person (except the United States) in any formal or informal appearance before, or, with the intent to influence, make any oral or written communication on behalf of any other person (except the United States) (1) to any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, (2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and (3) in which he participated personally and substantially as an employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed. (18 U.S.C. 207(a))

(b) No individual who has been an employee shall, within two years after his employment has ceased, knowingly act as agent or attorney for, or otherwise represent, any other person (except the United States) in any formal or informal appearance before, or with intent to influence, make any oral or written communication on behalf of any other person (except the United States) (1) to an organization enumerated in paragraph (a)(1) of this section, or any officer or employee thereof, (2) in connection with any matter enumerated and described in paragraph (a)(2) of this section, and (3) which was actually pending under his official responsibility as an employee within a period of one year prior to the termination of such responsibility. (18 U.S.C. 207(b)(i))

(c) No individual who has been an employee in an executive level position, in a position with a comparable or greater rate of pay, or in a position that involved significant decisionmaking or supervisory responsibility as designated by the Director of the Office of Government Ethics under 18 U.S.C. 207(d)(1)(C), shall, within two years after his employment in such position has ceased, knowingly represent or aid, counsel, advise, consult, or assist in representing any other person (except the United States) by personal presence at any formal or informal appearance before (1) an organization enumerated in paragraph (a)(1) of this section, or an officer or employee thereof, (2) in connection with any matter enumerated and described in paragraph (a)(2) of this section, and (3) in which he participated personally or substantially as an employee. (18 U.S.C. 207(b)(ii))

(d) No individual (other than one who was a special Government employee with service of less than sixty days in a given calendar year) who has been an employee in an executive level position or a position with a comparable or greater rate of pay, or in a position which involved significant decisionmaking or supervisory responsibility as designated by the Director of the Office of Government Ethics under 18 U.S.C. 207(d)(1)(C), shall, within one year after such employment has ceased, knowingly engage in conduct described in the next sentence. The prohibited knowing conduct is that of acting as attorney or agent for, or otherwise representing, anyone other than the United States in any formal or informal appearance before, or with the intent to influence, making any oral or written communication on behalf of anyone other than the United States (1) to the Department of Justice, or any employee thereof, (2) in connection with any rulemaking or any matter enumerated and described in paragraph (a)(2) of this section, and (3) which is pending before this Department or in which it has a direct and substantial interest. (18 U.S.C. 207(c); but see 5 CFR 737.13, 737.31 and 737.32)

(e) No partner of an employee shall act as agent or attorney for anyone other than the United States before an organization enumerated in paragraph (a)(1) of this section, or any officer or employee thereof, in connection with any matter enumerated and described in paragraph (a)(2) of this section in which such Government employee is participating or has participated personally and substantially as a Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or which is the subject of his official responsibility.

(18 U.S.C. 207(g))

[Order No. 885-80, 45 FR 26326, Apr. 18, 1980]

§ 45.735-7a Disciplinary proceedings under 18 U.S.C. 207(j).

(a) Upon a determination by the Assistant Attorney General in charge of the Criminal Division (Assistant Attorney General), after investigation, that there is reasonable cause to believe that a former officer or employee, including a former special Government employee, of the Department of Justice (former departmental employee) has violated 18 U.S.C. 207 (a), (b) or (c), the Assistant Attorney General shall cause a copy of written charges of the violation(s) to be served upon such individual, either personally or by registered mail. The charges shall be accompanied by a notice to the former departmental employee to show cause within a specified time of not less than 30 days after receipt of the notice why he or she should not be prohibited from engaging in representational activities in relation to matters pending in the Department of Justice, as authorized by 18 U.S.C. 207(j), or subjected to other appropriate disciplinary action under that statute. The notice to show cause shall include:

(1) A statement of allegations, and their basis, sufficiently detailed to enable the former departmental employee to prepare an adequate defense,

(2) Notification of the right to a hearing, and

(3) An explanation of the method by which a hearing may be requested.

(b) If a former departmental employee who submits an answer to the notice to show cause does not request a hearing or if the Assistant Attorney General does not receive an answer within five days after the expiration of the time prescribed by the notice, the Assistant Attorney General shall forward the record, including the report(s) of investigation, to the Attorney General. In the case of a failure to answer, such failure shall constitute a waiver of defense.

(c) Upon receipt of a former departmental employee's request for a hearing, the Assistant Attorney General shall notify him or her of the time and place thereof, giving due regard both to such person's need for an adequate period to prepare a suitable defense and an expeditious resolution of allegations that may be damaging to his or her reputation.

(d) The presiding officer at the hearing and any related proceedings shall be a federal administrative law judge or other federal official with comparable duties. He shall insure that the former departmental employee has, among others, the rights:

(1) To self-representation or representation by counsel,

(2) To introduce and examine witnesses and submit physical evidence,

(3) To confront and cross-examine adverse witnesses,

(4) To present oral argument, and

(5) To a transcript or recording of the proceedings, upon request.

(e) The Assistant Attorney General shall designate one or more officers or employees of the Department of Justice to present the evidence against the former departmental employee and perform other functions incident to the proceedings.

(f) A decision adverse to the former departmental employee must be sustained by substantial evidence that he violated 18 U.S.C. 207 (a), (b) or (c).

(g) The presiding officer shall issue an initial decision based exclusively on the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, and shall set forth in the decision findings and conclusions, supported by reasons, on the material issues of fact and law presented on the record.

(h) Within 30 days after issuance of the initial decision, either party may appeal to the Attorney General, who in that event shall issue the final decision based on the record of the proceedings or those portions thereof cited by the parties to limit the issues. If the final decision modifies or reverses the initial decision, the Attorney General shall specify the findings of fact and conclusions of law that vary from those of the presiding officer.

(i) If a former departmental employee fails to appeal from an adverse initial decision within the prescribed period of time, the presiding officer shall forward the record of the proceedings to the Attorney General.

(j) In the case of a former departmental employee who filed an answer to the notice to show cause but did not request a hearing, the Attorney General shall make the final decision on the record submitted to him by the Assistant Attorney General pursuant to subsection (b) of this section.

(k) The Attorney General, in a case where:

(1) The defense has been waived,

(2) The former departmental employee has failed to appeal from an adverse initial decision, or

(3) The Attorney General has issued a final decision that the former departmental employee violated 18 U.S.C. 207 (a), (b) or (c),

may issue an order:

(l) Prohibiting the former departmental employee from making, on behalf of any other person (except the United States), any informal or formal appearance before, or, with the intent to influence, any oral or written communication to, the Department of Justice on a pending matter of business for a period not to exceed five years, or

(ii) Prescribing other appropriate disciplinary action.

(l) An order issued under either paragraph (k)(3) (i) or (ii) of this section may be supplemented by a directive to officers and employees of the Department of Justice not to engage in conduct in relation to the former departmental employee that would contravene such order.

[Order No. 889-80, 45 FR 31717, May 14, 1980]

§ 45.735-8 Salary of employees payable only by United States.

(a) No employee, other than a special Government employee or an employee serving without compensation, shall receive any salary, or any contribution to or supplement of salary, as compensation for his services as an employee of the Department of Justice, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality.

(b) Nothing in this part shall be deemed to prohibit an employee from continuing to participate in a bona fide pension, retirement, group life, health, or accident insurance, profit-sharing, stock bonus, or other employee, welfare, or benefit plan maintained by a former employer.

(18 U.S.C. 209)

§ 45.735-9 Private professional practice and outside employment.

(a) No professional employee shall engage in the private practice of his profession, including the practice of law, except as may be authorized by or under paragraph (c) or (e) of this section. Acceptance of a forwarding fee shall be deemed to be within the foregoing prohibition. Teaching will not be considered "professional practice" for purposes of this rule. Employees who wish to undertake teaching engagements should consult § 45.735-12.

(b) Paragraph (a) of this section shall not be applicable to special Government employees.

(c)(1) Employees are encouraged to provide public interest professional services so long as such services do not interfere with their official responsibilities. Such public interest services must be conducted without compensation, and during off-duty hours or while on leave. Leave will be granted for court appearances or other necessary incidents of representation in accordance with established policy on leave administration (see DOJ Order 1630.1A). Representation of Federal employees in Equal Employment Opportunity (EEO) complaint procedures may be provided in accordance with § 45.735-6(c) of this title and the Department's established EEO policy (see DOJ Order 1713.5) rather than this subsection. No employee may seek, or assist a plaintiff who seeks, an award of attorney's fees for services provided pursuant to this subsection.

(2) Any *pro bono* services provided by an employee must be consistent with Federal law and regulations. In determining whether to provide *pro bono* services in a particular matter, the employee should give particular attention to the requirements of paragraph (f) of this section. Notice of intention to provide *pro bono* services shall be given in writing to the head of the employee's division (or in the case of an Assistant U.S. Attorney to the Executive Office of U.S. Attorneys with the U.S. Attorney's comments appended thereto). Should the division head or Executive Office believe the public interest professional service may not conform to the requirements of this section the disagreement will promptly be referred to the Deputy Attorney General for final resolution.

(3) Public interest services should fall into one of the following categories:

(i) Service to a client who does not have the financial resources to pay for professional services;

(ii) Services to assert or defend individual or public rights which society has a special interest in protecting;

(iii) Services to further the organizational purpose of a charitable, religious, civic, or educational organization; or

(iv) Services designed to improve the administration of justice.

(d) Employees may provide professional services, pursuant to § 45.735-

6(d) of this title, to those relatives and personal fiduciaries who are listed in that section.

(e) The Deputy Attorney General may make other specific exceptions to paragraph (a) of this section in unusual circumstances. Application for exceptions must be made in writing stating the reasons therefor, and directed to the Deputy Attorney General through the applicant's superior. Action taken by the Deputy Attorney General with respect to any such application shall be made in writing and shall be directed to the applicant.

(f) No employee shall engage in any professional practice under this section or any other outside employment if—

(1) The activity will in any manner interfere with the proper and effective performance of the employee's official duties;

(2) The activity will create or appear to create a conflict of interest;

(3) The activity will reflect adversely upon the Department of Justice;

(4) The employee's position in the Department of Justice will influence or appear to influence the outcome of the matter;

(5) The activity will involve assertions that are contrary to the interests or positions of the United States; or

(6) The activity involves any criminal matter or proceeding whether Federal, State or local, or any other matter or proceeding in which the United States (including the District of Columbia government) is a party or has a direct and substantial interest.

[Order No. 909-80, 45 FR 57125, Aug. 27, 1980, as amended by Order No. 960-81, 46 FR 52358, Oct. 27, 1981]

§ 45.735-10 Improper use of official information.

No employee shall use for financial gain for himself or for another person, or make any other improper use of, whether by direct action on his part or by counsel, recommendation, or suggestion to another person, information which comes to the employee by reason of his status as a Department of Justice employee and which has not become part of the body of public information.

§ 45.735-11 Investments.

No employee shall make investments: (a) In enterprises which it is reasonable to believe will be involved in decisions to be made by him, (b) on the basis of information which comes to him by reason of his status as a Department of Justice employee and which has not become part of the body of public information or (c) which are reasonably likely to create any conflict in the proper discharge of his official duties.

§ 45.735-12 Speeches, publications and teaching.

(a) No employee shall accept a fee from an outside source on account of a public appearance, speech, lecture, or publication if the public appearance or the preparation of the speech, lecture, or publication was a part of the official duties of the employee.

(b) No employee shall receive compensation or anything of monetary value for any consultation, lecture, teaching, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs or operations of the Department, or which draws substantially on official data or ideas which have not become part of the body of public information.

(c) No employee shall engage, whether with or without compensation, in teaching, lecturing or writing that is dependent on information obtained as a result of his Government employment except when that information has been made available to the general public or when the Deputy Attorney General gives written authorization for the use of nonpublic information on the basis that the use is in the public interest.

(d)(1) The Attorney General, Deputy Attorney General, Associate Attorney General, and the heads of divisions shall not make speeches or otherwise lend their names or support in a prominent fashion to a fundraising drive or a fundraising event or similar event intended for the benefit of any person. No Department of Justice employee or special Government employee shall engage in any of these activities if the invitation was extended primarily because of his official position with the Department or if the fact of his official position with the Department has been or will be used in the promotion of the event to any significant degree.

(2) For purposes of this subsection, an event wil be regarded as a fundraising event if any portion of the ticket or other cost of admission is designated as a charitable contribution for tax purposes, if one of its purposes is to produce net proceeds for the benefit of any person, or if it is a "kickoff" dinner or similar occasion that is part of a broader fundraising effort.

(3) Nothing in this subsection shall apply to the Combined Federal Campaign or any other authorized fundraising drive directed primarily at Federal employees, or to a fundraising event of an organization which is exempt from taxation under 26 U.S.C. 501(c)(3).

(4) Nothing in this subsection shall apply to a meeting, seminar, or conference sponsored by a professional or other appropriate organization where a tuition or other fee is charged for attendance if such tuition or fee is reasonable under the circumstances.

(e) When an employee is prohibited by this section from accepting compensation for an activity, he is also prohibited from suggesting that the person offering such compensation donate it to a particular charity or other third party.

[Order No. 350-65, 30 FR 17202, Dec. 31, 1965, as amended by Order No. 689-77, 42 FR 15315, Mar. 21, 1977; Order No. 760-77, 42 FR 64119, Dec. 22, 1977; Order No. 807-78, 43 FR 52702, Nov. 14, 1978; 44 FR 36036, June 20, 1979; Order No. 887-80, 45 FR 29874, May 5, 1980; Order No. 960-81, 46 FR 52356, Oct. 27, 1981]

§ 45.735-13 [Reserved]

§ 45.735-14 Gifts, entertainment, and favors.

(a) Except as provided in paragraph (c) of this section, an employee other than a special Government employee shall not solicit or accept, for himself or another person, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from a person who:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with the Department;

(2) Conducts operations or activities that are regulated by the Department;

(3) Is engaged, either as principal or attorney, in proceedings before the Departmental or in court proceedings in which the United States is an adverse party; or

(4) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duty.

(b) Except as provided in paragraph (c) of this section, a special Government employee shall be subject to the prohibition set forth in paragraph (a)(4) of this section.

(c) Paragraphs (a) and (b) of this section shall not be construed to prohibit:

(1) Solicitation or acceptance of anything of monetary value from a friend, parent, spouse, child or other close relative when the circumstances make it clear that the motivation for the action is a personal or family relationship.

(2) Acceptance of food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting.

(3) Acceptance of loans from banks or other financial institutions on customary terms of finance for proper and usual activities of employees, such as home mortgage loans.

(4) Acceptance of unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars and other items of nominal intrinsic value.

(d) No employee shall accept a gift, present, decoration, or other thing from a foreign government unless authorized by Congress as provided by the Constitution (Art. I, sec. 9, cl. 8) and in Pub. L. 89-673, 80 Stat. 952.

(e) No employee shall solicit a contribution from another employee for a gift to an official superior, nor make a donation as a gift to an official superior, nor accept a gift from an employee receiving less pay than himself (5 U.S.C. 7351). However, this paragraph does not prohibit a voluntary gift of nominal value or donation in a nominal amount made on a special occasion such as marriage, illness, or retirement.

(5 U.S.C. 7351)

[Order No. 350-65, 30 FR 17202, Dec. 31, 1965, as amended by Order No. 383-67, 32 FR 13217, Sept. 19, 1967; Order No. 960-81, 46 FR 52358, Oct. 27, 1981]

§ 45.735-14a Reimbursement for travel and subsistence; acceptance of awards.

(a) Employees may not accept reimbursement for travel or expenses incident to travel on official business from any source other than the Federal Government. However, employees may accept such reimbursement, from organizations that are exempt from taxation under the Internal Revenue Code, 26 U.S.C. 501(c)(3) for expenses incident to training or the attendance at meetings in accordance with 5 U.S.C. 4111 and 5 CFR 410.702.

(b) Employees may accept reimbursement for travel or expenses incident to travel of a nonofficial nature, so long as the circumstances are such that acceptance of the reimbursement is compatible with other restrictions set forth in this part.

(c) Employees will not be deemed to be on official business when they attend the meetings of a charitable, religious, professional, social, fraternal, educational, recreational, public service or civic organization if they have not been directed by the Department to attend the meeting and if they do not receive Government reimbursement for their travel or other expenses incident to attendance at the meetings.

(d) Employees may accept awards from the organizations described in paragraph (c) of this section, so long as the circumstances are such that acceptance is compatible with other restrictions set forth in this part.

(e) Employees may accept reimbursement for travel or expenses incident to travel from an organization described in paragraph (a) or (c) of this section for the actual expenses of an accompanying spouse in connection with the employee's attendance at the meetings of the organization or acceptance of an award from the organization. The acceptance of spousal expenses under this paragraph shall not depend upon the official or nonofficial nature of the employee's travel, but it must be otherwise compatible with the restrictions set forth in this part. In particular, employees may not accept spousal expenses from an organization that:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with the Department.

(2) Conducts operations or activities that are regulated by the Department.

(3) Is engaged, either as principal or attorney, in proceedings before the Department or in court proceedings in which the United States is an adverse party.

(4) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duties.

[Order No. 960-81, 46 FR 52358, Oct. 27, 1981]

§ 45.735-15 Employee indebtedness.

The Department of Justice considers the indebtedness of its employees to be essentially a matter of their own concern. The Department of Justice will not be placed in the position of acting as a collection agency or of determining the validity or amount of contested debts. Nevertheless, failure on the part of an employee without good reason and in a proper and timely manner to honor debts acknowledged by him to be valid or reduced to judgment by a court or to make or to adhere to satisfactory arrangements for the settlement thereof may be the cause for disciplinary action. In this connection each employee is expected to meet his responsibilities for payment of Federal, State, and local taxes.

§ 45.735-16 Misuse of Federal property.

No employees may use Federal property for other than officially approved activities. Each employee is responsible for protecting and conserving Federal property, including equipment and supplies.

§ 45.735-17 Gambling, betting, and lotteries.

No employee shall participate, while on Government property or while on duty for the Government, in the operation of gambling devices, in conducting an organized lottery or pool, in games for money or property, or in selling or purchasing numbers tickets.

§ 45.735-18 [Reserved]

§ 45.735-19 Partisan political activities.

(a) While certain political activities are prohibited by the criminal statutes of the United States (see 18 U.S.C. Chapter 29), the basic restrictions on political activity of employees are set forth in 5 U.S.C. 7321-7328.

(b) Most employees are subject to both statutory and Civil Service restrictions upon partisan political activities although employees of the Federal Government in some geographical areas may take part in certain local political activities. Employees have the right to vote as they choose and to express opinions on political subjects and candidates. Detailed information may be obtained through administrative and personnel offices.

[Order No. 350-65, 30 FR 17202, Dec. 31, 1965, as amended by Order No. 383-67, 32 FR 13217, Sept. 19, 1967; Order No. 960-81, 46 FR 52356, Oct. 27, 1981]

§ 45.735-21 Miscellaneous statutory provisions.

Each employee should be aware of the following statutory prohibitions against:

(a) Lobbying with appropriated funds (18 U.S.C. 1913).

(b) Disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918).

(c) Employment of a member of a Communist organization (50 U.S.C. 784).

(d) (1) Disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783); and (2) disclosure of confidential information (18 U.S.C. 1905).

(e) Habitual use of intoxicants to excess (5 U.S.C. 7352).

(f) Misuse of a Government vehicle (31 U.S.C. 638a).

(g) Misuse of the franking privilege (18 U.S.C. 1719).

(h) Use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(i) Fraud or false statements in a Government matter (18 U.S.C. 1001).

(j) Multilating or destroying a public record (18 U.S.C. 2071).

(k) Counterfeiting and forging transportation requests (18 U.S.C. 508).

(l)(1) Embezzlement of Government money or property (18 U.S.C. 641); (2) failing to account for public money (18 U.S.C. 643); and (3) embezzlement of the money or property of another person in the possession of an employee by reason of his employment (18 U.S.C. 654).

(m) Unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(n) Acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

(o) Engaging in violation of merit system principles (5 U.S.C. 2301).

(p) Engaging in prohibited personnel practices (5 U.S.C. 2302).

[Order No. 350-65, 30 FR 17202, Dec. 31, 1965, as amended by Order No. 383-67, 32 FR 13217, Sept. 19, 1967; Order No. 960-81, 46 FR 52356, Oct. 27, 1981]

§ 45.735-22 Reporting of outside interests by persons other than special Government employees.

(a) Each employee occupying a position designated in paragraph (c) of this section, and who is not required to submit a financial disclosure report under § 45.735-27 of this title, shall submit to the head of his division a statement on a form made available through the appropriate division administrative office, setting forth the following information:

(1) A list of the names of all corporations, companies, firms, or other business enterprises, partnerships, nonprofit organizations, and educational or other institutions with or in which he, his spouse, minor child or other member of his immediate household has—

(i) Any connection as an employee, officer, owner, director, member, trustee, partner, adviser or consultant; or

(ii) Any continuing financial interest, through a pension or retirement plan, shared income, or other arrangement as a result of any current or prior employment or business or professional association; or

(iii) Any financial interest through the ownership of stock, stock options, bonds, securities, or other arrangements including trusts, except those financial interests described in § 45.735-5(b).

(2) A list of the names of his creditors and the creditors of his spouse, minor child or other member of his immediate household, other than those creditors to whom any such person may be indebted by reason of a mortgage on property which he occupies as a personal residence or to whom such person may be indebted for current and ordinary household and living expenses such as those incurred for household furnishings, an automobile, education, vacations or the like.

(3) A list of his interests and those of his spouse, minor child or other member of his immediate household in real property or rights in lands, other than property which he occupies as a personal residence.

For the purpose of this section "member of his immediate household" means a resident of the employee's household who is related to him by blood.

(b) Each employee designated in paragraph (c) of this section who enters upon duty after the date of this order, and who is not required to submit a financial disclosure report under § 45.735-27 of this title, shall submit such statement not later than 30 days after the date of his entrance on duty or 90 days after the effective date of this order, whichever is later.

(c) Statements of employment and financial interest are required of the following employees:

(1) Office of the Attorney General:

Counsellor
Special Assistants
Special Counsels

(2) Office of the Deputy Attorney General:

Associate Deputy Attorneys General
Executive Assistant

(3) Office of the Associate Attorney General:

Deputy Associate Attorneys General
Special Assistants

(4) Office of the Solicitor General:

Tax Assistant

(5) Office of Legal Counsel:

Deputy Assistant Attorneys General

(6) Office of Legal Policy:

Deputy Assistant Attorneys General

(7) Office of Legislative Affairs:

Deputy Assistant Attorneys General
Chief, Legislative and Legal Section

(8) Justice Management Division:

Deputy Assistant Attorneys General
Staff Directors
Administrative Counsel

(9) Office of Professional Responsibility:

Counsel on Professional Responsibility
Deputy Counsel
Assistant Counsels

(10) Community Relations Service:

Deputy Director
Associate Director
Chief Counsel
Regional Directors

(11) Antitrust Division:

Deputy Assistant Attorney General
Director of Economic Policy Office
Director of Operations
Deputy Director of Operations
Director, Policy Planning Office
Section Chiefs
Field Office Chiefs

(12) Civil Division:

Deputy Assistant Attorney General
Section Chiefs

(13) Civil Rights Division:

Deputy Assistant Attorneys General
Special Assistants
Executive Officer
Section Chiefs
Director(s) of Offices

(14) Criminal Division:

Deputy Assistant Attorneys General
Section Chiefs

(15) Land and Natural Resources Division:

Deputy Assistant Attorneys General
Section Chiefs

(16) Tax Division:

Deputy Assistant Attorneys General
Section Chiefs

(17) Federal Bureau of Investigation:

Assistant Director, Administrative Services Division

(18) National Institute of Corrections (Bureau of Prisons):

Director, National Institute of Corrections
Employees classified at GS-13 or above who are in positions involving: (i) Contracting or procurement, or (ii) administering, auditing or monitoring grants and contracts

(19) Drug Enforcement Administration:

Assistant Administrators
Office Directors
Chief Counsel
Chief Inspector
Controller
Laboratory Directors
Regional Directors
Chief, Administrative Services Division
Contract and Procurement Officer
Contract Specialists, GS-13 and above
Chief, Compliance Division
Section Chiefs, Compliance Division
Project Officer, GS-13 and above

(20) Immigration and Naturalization Service:

Associate Commissioner, Management
Assistant Commissioner, Administration
Regional Commissioners
Deputy Regional Commissioners
Associate Deputy Regional Commissioners, Management

(21) Office of Justice Assistance, Research and Statistics:

Assistant Directors
Special Assistants to the Director and the Assistant Directors
General Counsel
Administrator, Law Enforcement Assistance Administration
Administrator, Office of Juvenile Justice and Delinquency Prevention
Director, National Institute of Justice
Director, Bureau of Justice Statistics
All Deputy Administrators of the above offices
Employees classified at GS-13 or above who are in positions involving: (i) Contracting or procurement, or (ii) administering, auditing or monitoring grants and contracts.

(22) United States Marshals Service:

Director
Deputy Director
United States Marshals

(d) Changes in, or additions to, the information contained in an employee's statement of employment and financial interests shall be reported in a supplementary statement as of June 30 each year. If no changes or additions occur, a negative report is required. Notwithstanding the filing of the annual report required by this section, each employee shall at all times avoid acquiring a financial interest that could result, or taking an action that would result, in a violation of the conflict-of-interest provisions set forth in this part.

(e) If any information required to be included on a statement of employment and financial interests or supplementary statement, including holdings placed in trust, is not known to the employee but is known to another person, the employee shall request that other person to submit information in his behalf.

(f) Paragraph (a) of this section does not require an employee to submit any information relating to his connection with, or interest in, a professional society or a charitable, religious, social, fraternal, recreational, public service, civic, or political organization or a similar organization not conducted as a business enterprise. For the purpose of this section, educational and other institutions doing research and development or related work involving grants of money from or contracts with the Government are deemed "business enterprises" and are required to be included in an employee's statement of employment and financial interests.

(g) The Department shall hold each statement of employment and financial interests in confidence, and each statement shall be maintained in confidential files in the immediate office of the division head. Each division head shall designate which employees are authorized to review and retain the statements and shall limit such designation to those employees who are his immediate assistants. Employees so designated are responsible for maintaining the statements in confidence and shall not allow access to, or allow information to be disclosed from, a statement except to carry out the purpose of this part. The Department may not disclose information from a statement except as the Civil Service Commission or the Associate Attorney General may determine for good cause. Upon termination of the employment in the Department of any person subject to this section, statements which he has submitted in accordance with paragraph (a) of this section shall be disposed of in accordance with established Department procedures applicable to confidential records. In the event an employee subject to this section is transferred within the Department, statements which he has filed pursuant to paragraph (a) of this section shall be transferred to the head of the division to which the employee is reassigned.

(h) The statements of employment and financial interests and supplementary statements required of employees are in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, order or regulation. The submission of a statement by an employee does not permit him or any other person to participate in a matter in which his or the other person's participation is prohibited by law, order, or regulation.

(i) Any employee who believes that his position has been improperly determined to be subject to the reporting requirements of § 45.735-22 may obtain review of such determination through the grievance procedure set forth in 28 CFR Part 46 [At 36 FR 12096, June 25, 1971, 28 CFR Part 46 was removed].

(28 U.S.C. 509, 510)

[Order No. 350-65, 30 FR 17202, Dec. 31, 1965, as amended by Order No. 383-67, 32 FR 13217, Sept. 19, 1967; Order No. 412-69, 34 FR 5726, Mar. 27, 1969; Order No. 653-76, 41 FR 27317, July 2, 1976; Order No. 699-77, 42 FR 15315, Mar. 21, 1977; Order No. 732-77, 42 FR 35970, July 13, 1977; Order No. 899-80, 45 FR 43703, June 30, 1980; Order No. 960-81, 46 FR 52358, Oct. 27, 1981]

§ 45.735-23 Reporting of outside interests by special Government employees.

(a) A special Government employee shall submit to the head of his division a statement of employment and financial interests which reports: (1) All other employment, and (2) those financial interests which the head of his division determines are relevant in the light of the duties he is to perform.

(b) A statement required under this section shall be submitted at the time of employment and shall be kept current throughout the period of employment by the filing of supplementary statements in accordance with the requirements of § 45.735-22(d). Statements shall be on forms made available through division administrative officers.

(c) This section shall not be construed as requiring the submission of information referred to in § 45.735-22(f).

(d) Paragraphs (g) and (h) of § 45.735-22 shall be applicable with respect to statements required by this section.

[Order No. 350-65, 30 FR 17202, Dec. 31, 1965, as amended by Order No. 383-67, 32 FR 13218, Sept. 19, 1967]

§ 45.735-24 Reviewing statements of financial interests.

(a) The head of each division shall review financial statements required of any of his subordinates by §§ 45.735-22 and 45.735-23 to determine whether there exists a conflict, or possibility of conflict, between the interests of a subordinate and the performance of his service for the Government. If the head of the division determines that such a conflict or possibility of conflict exists, he shall consult with the subordinate. If he concludes that remedial action should be taken, he shall refer the statement to the Associate Attorney General, through the Department Counselor, with his recommendation for such action. The Associate Attorney General, after such investigation as he deems necessary, shall direct appropriate remedial action if he deems it necessary.

(b) Remedial action may include, but is not limited to:

(1) Changes in assigned duties.

(2) Divestment by the employee of his conflicting interest.

(3) Disqualification for a particular action.

(4) Exemption pursuant to § 45.735-5.

(5) Disciplinary action.

[Order No. 350-65, 30 FR 17202, Dec. 31, 1965, as amended by Order No. 699-77, 42 FR 15315, Mar. 21, 1977]

§ 45.735-25 Supplemental regulations.

The heads of divisions may issue supplemental and implementing regulations not inconsistent with this part.

§ 45.735-26 Designated Agency Ethics Official.

(a) The Assistant Attorney General for Administration is the "designated agency ethics official" (DAEO) for this Department. Each division head is directed to nominate an individual to be designated by the DAEO as a Deputy DAEO for the component under the division head's supervision.

(b) In addition to the duties listed in 5 CFR 738.203, the DAEO shall provide for the regular distribution of conduct regulations to employees, and otherwise assist the Offices, Boards and Divisions in meeting their responsibilities under this part.

(c) Each Deputy DAEO, under the general supervision and guidance of the DAEO, shall have responsibility for coordinating and managing the Department's Ethics Program within his or her component, including the education and counselling of employees on matters of conduct and professional ethics.

(d) Each Deputy DAEO, within his or her component, shall:

(1) Assist in the review and certification of public financial disclosure statements filed under the Ethics in Government Act of 1978 as required by 28 CFR 45.735-27(d);

(2) Assist in the review and certification of any confidential financial disclosure reports filed by employees;

(3) Counsel employees with regard to actual or potential conflicts of interest and other ethical standards;

(4) Counsel departing and former employees on post-employment conflicts of interest standards;

(5) Provide training and education in standards of conduct for all employees;

(6) Provide for the efficient dissemination, collection and review of public and confidential financial disclosure statements required by the Ethics in Government Act of 1978 and regulations published thereunder;

(7) Report annually to the DAEO any circumstances or situations which have resulted or may result in noncompliance with ethics laws and regulations;

(8) Assist the division head in taking prompt and effective action, including administrative action, to remedy:

(i) Violations or potential violations, or appearances thereof, of the Department's standards of conduct, including post-employment regulations;

(ii) The failure to file a financial disclosure report or portions thereof;

(iii) Potential or actual conflicts of interest, or appearances thereof, which were disclosed on a financial disclosure report; and

(iv) Potential or actual violation of other laws governing the conduct or financial holdings of officers or employees of the Department;

(9) Assist the division head in ensuring that ordered remedial actions, including divestiture and disqualification, are actually taken; and

(10) Perform other duties as required by the DAEO, the Attorney General, or, when appropriate, the Office of Government Ethics.

(e) Each division head will notify the DAEO when that division's Deputy DAEO is no longer able to serve and will nominate a new Deputy DAEO to be appointed by the DAEO.

[Order No. 960-81, 46 FR 52358, Oct. 27, 1981, and Order No.1045-84, 49 FR 5921, Feb. 16, 1984]

§ 45.735-27 Public financial disclosure requirements.

(a) *Persons required to file.* (1) Except as provided in paragraph (a)(2) of this section, the following persons must file a public financial disclosure report as required by Title II of the Ethics in Government Act of 1978:

(i) Each employee in the Department of Justice whose salary is fixed under Subchapter II of Chapter 53 of Title 5, United States Code (the Executive Schedule);

(ii) Each employee whose position is classified at GS-16 or above of the General Schedule prescribed by 5 U.S.C. 5332 or whose salary is required by law to be established at the minimum rate of basic pay for level GS-16 or above of the General Schedule;

(iii) Each United States Attorney;

(iv) Each Assistant United States Attorney occupying a supervisory position whose optimum pay level is established at the equivalent of the minimum rate of basic pay for GS-16 or above and who is actually compensated at a rate of pay equal to or greater than the minimum rate of basic pay for GS-16.

(v) Each employee appointed pursuant to section 3105 of Title 5, United States Code (Administrative Law Judges);

(vi) Each employee who is in a position which is excepted from the competitive service because it is of a confidential or policy-making character (Schedule C), as set forth in 5 CFR 213.3310[1], and who has a role in advising or making policy determinations with respect to agency programs or policies. Schedule C employees having policy-making roles, such as Special Assistants to the head of a division, must file a report under this provision, but Schedule C employees who do not have a policy role, such as chauffeurs, private secretaries, and stenographers, need not;

(vii) Any other employee (other than an Assistant United States Attorney or an employee compensated under the General Schedule), including a special government employee, paid at a rate equal to or greater than the minimum rate of basic pay established for level GS-16 of the General Schedule; and

(viii) Any person nominated by the President to a position described in paragraphs (a)(1)(i) through (a)(1)(vii) of this section appointment to which requires the advice and consent of the Senate.

(2) An employee identified in paragraph (a)(1) of this section who is retained, designated, appointed or employed to perform services on all or part of 60 or fewer days in a calendar year is not required to file a public financial disclosure report. However, an employee who was initially expected to perform services on 60 or fewer days but who thereafter performs services on more than 60 days in a calendar year must immediately comply with the public disclosure requirements as if he had been covered by those requirements as of the date of his initial retention, designation, appointment, or employment.

(b) *Time of filing.* (1) Each employee described in paragraph (a) of this section must file a report: (i) Within 30 days of assuming his position, unless he has left another position in the Executive Branch covered by the public disclosure requirements; (ii) annually, on or before May 15, covering the preceding calendar year; and (iii) within 30 days of leaving his position, unless he accepts another position in the Executive Branch covered by the public disclosure requirements.

(2) The reviewing official designated in paragraph (d) of this section may, for good cause, extend the deadline for filing reports identified in paragraph (a)(1) of this section for up to 30 days. The reviewing official may grant an extension of up to 15 additional days if the employee submits in writing reasons which establish good cause for an extension. Any further extension must be approved by the Director of the Office of Government Ethics.

(3) A person nominated to a position appointment to which requires the advice and consent of the Senate must file his report within 5 days of the transmittal of his nomination to the Senate by the President.

(4) The Assistant Attorney General for Administration and an employee in or nominee to a position appointment to which requires the advice and consent of the Senate shall furnish a copy of his report to the Director of the Office of Government Ethics at the time he files the original report with the appropriate reviewing official.

(c) *Approvals by Director of the Office of Government Ethics.* A publicly available waiver permitting the omission of information pertaining to certain gifts under section 202(a)(2) of the Act and the approval of blind trusts under section 202(f)(3)(D) of the Act may only be granted by the

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[1] Section 213.3310 was superseded by a document published at 46 FR 20147, Apr. 2, 1981, revising Part 213 in its entirety.

Director of the Office of Government Ethics.

(d) *Identification of reviewing officials.* (1) Reports filed by employees described in paragraph (a) of this section shall be filed with and reviewed by the following officials:

(i) The Associate Attorney General shall review reports filed by the Attorney General and any employee in the Office of the Attorney General;

(ii) The Attorney General shall review reports filed by the Deputy Attorney General;

(iii) The Deputy Attorney General shall review reports filed by the Associate Attorney General, Solicitor General, Director of the Federal Bureau of Investigation, and the head of each division under his supervision;

(iv) The Associate Attorney General shall review reports filed by the head of each division not included in paragraph (d)(1)(iii) of this section;

(v) The Director of the Executive Office for United States Attorneys shall review reports filed by United States Attorneys and Assistant United States Attorneys;

(vi) Except as provided above, the head of each division shall review reports filed by employees of that division.

(2) The function of reviewing reports under paragraphs (d)(1)(iii) through (d)(1)(vi) of this section may be delegated to an Associate Deputy Attorney General, Deputy Associate Attorney General, or deputy, associate, or assistant head of a division, as the case may be.

(3) The report filed by a person nominated to a position appointment to which requires the advice and consent of the Senate shall be filed with and reviewed by the official designated in paragraph (d)(1) of this section as having responsibility for reviewing reports filed by the incumbent in the position.

(4) Each reviewing official is responsible for ensuring that reports required to be filed with him are filed in a complete and timely manner.

(e) *Review procedure.* (1) Each reviewing official shall endeavor to review each report filed with him within 15 days of receiving it (and shall review the report within 60 days of receipt) to determine whether, on the basis of information contained in the report, the reporting individual is in compliance with applicable laws and regulations governing conflicts of interest and apparent conflicts of interest.

(2) If the reviewing official believes additional information is required to be submitted, he shall notify the individual and inform him of the date on which the additional information must be submitted.

(3) If, on the basis of information contained in the report, the reviewing official is of the opinion that the reporting individual is in compliance with applicable laws and regulations, he shall sign the report and forward it to the Assistant Attorney for Administration. The reviewing official shall retain a copy of the report.

(4) If, on the basis of information contained in the report, the reviewing official believes that the reporting individual is not in compliance with applicable laws and regulations, he shall notify the individual, state what remedial action he believes is appropriate, and afford the reporting individual a reasonable opportunity to submit an oral or written response.

(5) If, after considering the reporting individual's response, the reviewing official concludes that the reporting individual is not in compliance with applicable laws and regulations and that the reporting individual has not taken adequate measures to come into compliance, the reviewing official shall refer the matter to the Associate Attorney General (or if referral to the Associate Attorney General is inappropriate, to the Deputy Attorney General) with his recommendation regarding remedial action to be taken.

(6) After such investigation as he deems appropriate, the Associate Attorney General shall direct remedial action or refer the matter to the Attorney General, Deputy Attorney General, or Solicitor General for appropriate action, including possible referral to the President if the situation involves an employee in a position appointment to which requires the advice and consent of the Senate.

(7) Remedial action under this subsection may include, but is not limited to:

(i) Divestiture;

(ii) Restitution;

(iii) Establishment of a blind trust;

(iv) Request for exemption under 18 U.S.C. 208(b); or

(v) Disqualification, transfer, reassignment, limitation of duties, or discharge.

(8) When satisfactory measures have been taken to resolve any problems identified in the review process, the reviewing official or the official ordering remedial action shall sign the report with such notations and comments as may be appropriate.

(f) *Public availability of report.* (1) The Assistant Attorney General for Administration shall provide for the inspection of a report by, or the furnishing of a copy of a report to, any person upon request within 15 days after the report is filed with the appropriate reviewing official.

(2) If the Assistant Attorney General for Administration has not yet received the report, signed by the reviewing official, which a member of the public has requested to inspect or copy, the Assistant Attorney General for Administration shall request the reviewing official to ensure that the report is immediately made available for inspection or copying.

[Order No. 832-79, 44 FR 29891, May 23, 1979, as amended by Order No. 1013-83, 48 FR 23184, May 24, 1983]

APPENDIX—CODE OF ETHICS FOR GOVERNMENT SERVICE

[H. Con. Res. No. 175, 85th Cong.]

Resolved by the House of Representatives (the Senate concurring), That it is the sense of the Congress that the following Code of Ethics should be adhered to by all Government employees, including officeholders:

Any person in Government service should:

1. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department.
2. Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.
3. Give a full day's labor for a full day's pay; giving to the performance of his duties his earnest effort and best thought.
4. Seek to find and employ more efficient and economical ways of getting tasks accomplished.
5. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.
6. Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.
7. Engage in no business with the Government, either directly or indirectly, which is inconsistent with the conscientious performance of his governmental duties.
8. Never use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.
9. Expose corruption whenever discovered.
10. Uphold these principles, ever conscious that public office is a public trust. Passed July 11, 1958.

APPENDIX—MEMORANDUM RE THE CONFLICT OF INTEREST PROVISIONS OF PUB. L. 87-849, 76 STAT. 1119, APPROVED OCTOBER 23, 1962

INTRODUCTION

Public Law 87-849, which came into force January 21, 1963, affected seven statutes which applied to officers and employees of the Government and were generally spoken of as the "conflict of interest" laws. These included six sections of the criminal code, 18 U.S.C. 216, 281, 283, 284, 434, and 1914, and a statute containing no penalties, section 190 of the Revised Statutes (5 U.S.C. 99). Pub. L. 87-849 (sometimes referred to hereinafter as "the Act") repealed section 190 and one of the criminal statutes, 18 U.S.C. 216, without replacing them.[1] In addition it

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[1] Section 190 of the Revised Statutes (5 U.S.C. 99), which was repealed by section 3 of Pub. L. 87-849, applied to a former officer or employee of the Government who had served in a department of the executive branch. It prohibited him, for a period of two years after his employment had ceased, from representing anyone in the prosecution of a claim against the United States which was pending in that or any other executive department during his period of employment. The subject of postemployment activities of former Government officers and employees was also dealt with in another statute which was repealed, 18 U.S.C. 284. Pub. L. 87-849 covers the subject in a

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repealed and supplanted the other five criminal statutes. It is the purpose of this memorandum to summarize the new law and to describe the principal differences between it and the legislation it has replaced.

The Act accomplished its revisions by enacting new sections 203, 205, 207, 208, and 209 of Title 18 of the United States Code and providing that they supplant the abovementioned sections 281, 283, 284, 434 and 1914 of Title 18 respectively.[2] It will be convenient, therefore, after summarizing the principal provisions of the new sections, to examine each section separately, comparing it with its precursor before passing to the next. First of all, however, it is necessary to describe the background and provisions of the new 18 U.S.C. 202(a), which has no counterpart among the statutes formerly in effect.

SPECIAL GOVERNMENT EMPLOYEES—NEW 18 U.S.C. 202(a)

In the main the prior conflict of interest laws imposed the same restrictions on individuals who serve the Government intermittently or for a short period of time as on those who serve full-time. The consequences of this generalized treatment were pointed out in the following paragraph of the Senate Judiciary Committee report on the bill which became Pub. L. 87-849:[3]

> In considering the application of present law in relation to the Government's utilization of temporary or intermittent consultants and advisers, it must be emphasized that most of the existing conflict-of-interest statutes were enacted in the 19th century—that is, at a time when persons outside the Government rarely served it in this way. The laws were therefore directed at activities of regular Government employees, and their present impact on the occasionally needed experts—those whose main work is performed outside the Government—is unduly severe. This harsh impact constitutes an appreciable deterrent to the Government's obtaining needed part-time services.

The recruiting problem noted by the Committee generated a major part of the impetus for the enactment of Pub. L. 87-849. The Act dealt with the problem by creating a category of Government employees termed "special Government employees" and by excepting persons in this category from certain of the prohibitions imposed on ordinary employees. The new 18 U.S.C. 202(a) defines the term "special Government employee" to include, among others, officers and employees of the departments and agencies who are appointed or employed to serve, with or without compensation, for not more than 130 days during any period of 365 consecutive days either on a full-time or intermittent basis.

SUMMARY OF THE MAIN CONFLICT OF INTEREST PROVISIONS OF PUB. L. 87-849

A regular officer or employee of the Government—that is, one appointed or employed to serve more than 130 days in any period of 365 days—is in general subject to the following major prohibitions (the citations are to the new sections of Title 18):

1. He may not, except in the discharge of his official duties, represent anyone else before a court or Government agency in a matter in which the United States is a party or has an interest. This prohibition applies both to paid and unpaid representation of another (18 U.S.C. 203 and 205).

2. He may not participate in his governmental capacity in any matter in which he, his spouse, minor child, outside business associate or person with whom he is negotiating for employment has a financial interest (18 U.S.C 208).

3. He may not, after his Government employment has ended, represent anyone other than the United States in connection with a matter in which the United States is a party or has an interest and in which he participated personally and substantially for the Government (18 U.S.C. 207(a)).

4. He may not, for 1 year after his Government employment has ended, represent anyone other than the United States in connection with a matter in which the United States is a party or has an interest and which was within the boundaries of his official responsibility[4] during the last year of

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single section enacted as the new 18 U.S.C. 207.

18 U.S.C. 216, which was repealed by section 1(c) of Pub. L. 87-849, prohibited the payment to or acceptance by a Member of Congress or officer or employee of the Government of any money or thing of value for giving or procuring a Government contract. Since this offense is within the scope of the newly enacted 18 U.S.C. 201 and 18 U.S.C. 203, relating to bribery and conflicts of interest, respectively, section 216 is no longer necessary.

[2] See section 2 of Pub. L. 87-849. 18 U.S.C. 281 and 18 U.S.C. 283 were not completely set aside by section 2 but remain in effect to the extent that they apply to retired officers of the Armed Forces (see "Retired Officers of the Armed Forces," *infra*).

[3] S. Rept. 2213, 87th Cong., 2d sess., p. 6.

[4] The term "official responsibility" is defined by the new 18 U.S.C. 202(b) to mean "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action."

his Government service (18 U.S.C. 207(b)). This temporary restraint of course gives way to the permanent restraint described in paragraph 3 if the matter is one in which he participated personally and substantially.

5. He may not receive any salary, or supplementation of his Government salary, from a private source as compensation for his services to the Government (18 U.S.C. 209).

A special Government employee is in general subject only to the following major prohibitions:

1. (a) He may not, except in the discharge of his official duties, represent anyone else before a court or Government agency in a matter in which the United States is a party or has an interest and in which he has at any time participated personally and substantially for the Government (18 U.S.C. 203 and 205).

(b) He may not, except in the discharge of his official duties, represent anyone else in a matter pending before the agency he serves unless he has served there no more than 60 days during the past 365 (18 U.S.C. 203 and 205). He is bound by this restraint despite the fact that the matter is not one in which he has ever participated personally and substantially.

The restrictions described in subparagraphs (a) and (b) apply to both paid and unpaid representation of another. These restrictions in combination are, of course, less extensive than the one described in the corresponding paragraph 1 in the list set forth above with regard to regular employees.

2. He may not participate in his governmental capacity in any matter in which he, his spouse, minor child, outside business associate or person with whom he is negotiating for employment has a financial interest (18 U.S.C. 208).

3. He may not, after his Government employment has ended, represent anyone other than the United States in connection with a matter in which the United States is a party or has an interest and in which he participated personally and substantially for the Government (18 U.S.C. 207(a)).

4. He may not, for 1 year after his Government employment has ended, represent anyone other than the United States in connection with a matter in which the United States is a party or has an interest and which was within the boundaries of his official responsibility during the last year of his Government Service (18 U.S.C. 207(b)). This temporary restraint of course gives way to the permanent restriction described in paragraph 3 if the matter is one in which he participated personally and substantially.

It will be seen that paragraphs 2, 3 and 4 for special Government employees are the same as the corresponding paragraphs for for regular employees. Paragraph 5 for the latter, describing the bar against the receipt of salary for Government work from a private source does not apply to special Government employees.

As it appears below, there are a number of exceptions to the prohibitions summarized in the two lists.

COMPARISON OF OLD AND NEW CONFLICT OF INTEREST SECTIONS OF TITLE 18, UNITED STATES CODE

New 18 U.S.C. 203. Subsection (a) of this section in general prohibits a Member of Congress and an officer or employee of the United States in any branch or agency of the Government from soliciting or receiving compensation for services rendered on behalf of another person before a Government department or agency in relation to any particular matter in which the United States is a party or has a direct and substantial interest. The subsection does not preclude compensation for services rendered on behalf of another in court.

Subsection (a) is essentially a rewrite of the repealed portion of 18 U.S.C. 281. However, subsections (b) and (c) have no counterparts in the previous statutes.

Subsection (b) makes it unlawful for anyone to offer or pay compensation the solicitation or receipt of which is barred by subsection (a).

Subsection (c) narrows the application of subsection (a) in the case of a person serving as a special Government employee to two, and only two, situations. First, subsection (c) bars him from rendering services before the Government on behalf of others, for compensation, in relation to a matter involving a specific party or parties in which he has participated personally and substantially in the course of his Government duties. And second, it bars him from such activities in relation to a matter involving a specific party or parties, even though he has not participated in the matter personally and substantially, if it is pending in his department or agency and he has served therein more than 60 days in the immediately preceding period of a year.

New 18 U.S.C. 205. This section contains two major prohibitions. The first prevents an officer or employee of the United States in any branch or agency of the Government from acting as agent or attorney for prosecuting any claim against the United States, including a claim in court, whether for compensation or not. It also prevents him from receiving a gratuity, or a share or interest in any such claim, for assistance in the prosecution thereof. This portion of section 205 is similar to the repealed portion of 18 U.S.C. 283, which dealt only with claims against the United States, but it omits a bar contained in the latter—i.e., a bar against rendering uncompensated aid or assistance in the prosecution or support of a claim against the United States.

The second main prohibition of section 205 is concerned with more than claims. It precludes an officer or employee of the Government from acting as agent or attorney for anyone else before a department, agency or court in connection with any particular matter in which the United States is a party or has a direct and substantial interest.

Section 205 provides for the same limited application to a special Government employee as section 203. In short, it precludes him from acting as agent or attorney only (1) in a matter involving a specific party or parties in which he has participated personally and substantially in his governmental capacity, and (2) in a matter involving a specific party or parties which is before his department or agency, if he has served therein more than 60 days in the year past.

Since new sections 203 and 205 extend to activities in the same range of matters, they overlap to a greater extent than did their predecessor sections 281 and 283. The following are the few important differences between sections 203 and 205:

1. Section 203 applies to Members of Congress as well as officers and employees of the Government; section 205 applies only to the latter.

2. Section 203 bars services rendered for compensation solicited or received, but not those rendered without such compensation; section 205 bars both kinds of services.

3. Section 203 bars services rendered before the departments and agencies but not services rendered in court; section 205 bars both.

It will be seen that while section 203 is controlling as to Members of Congress, for all practical purposes section 205 completely overshadows section 203 in respect of officers and employees of the Government.

Section 205 permits a Government officer or employee to represent another person, without compensation, in a disciplinary, loyalty or other personnel matter. Another provision declares that the section does not prevent an officer or employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt.[5]

Section 205 also authorizes a limited waiver of its restrictions and those of section 203 for the benefit of an officer or employee, including a special Government employee, who represents his own parents, spouse or child, or person or estate he serves as a fiduciary. The waiver is available to the officer or employee, whether acting for any such person with or without compensation, but only if approved by the official making appointments to his portion. And in no event does the waiver extend to his representation of any such person in matters in which he has participated personally and substantially or which, even in the absence of such participation, are the subject of his official responsibility.

Finally, section 205 gives the head of a department or agency the power, notwithstanding any applicable restrictions in its provisions or those of section 203, to allow a special Government emloyee to represent his regular employer or other outside organization in the performance of work under a Government grant or contract. However, this action is open to the department or agency head only upon his certification, published in the Federal Register, that the national interest requires it.

New 18 U.S.C. 207. Subsections (a) and (b) of this section contain postemployment prohibitions applicable to persons who have ended service as officers or employees of the executive branch, the independent agencies or the District of Columbia.[6] The prohibitions for persons who have served as special Government employees are the same as for persons who have performed regular duties.

The restraint of subsection (a) is against a former officer or employee's acting as agent or attorney for anyone other than the United States in connection with certain matters, whether pending in the courts or elsewhere. The matters are those involving a specific party or parties in which the United States is one of the parties or has a direct and substantial interest and in which the former officer or employee participated personally and substantially while holding a Government position.

Subsection (b) sets forth a 1-year postemployment prohibition in respect of those matters which were within the area of official responsibility of a former officer or employee at any time during the last year of his service but which do not come within subsection (a) because he did not participate in them personally and substantially. More particularly, the prohibition of subsection (b) prevents his personal appearance in such matters before a court or a department or agency of the Government as agent or attorney for anyone other than the United States.[7] Where, in the year prior to the end of his service, a former officer or employee has changed areas of responsibility by transferring from one agency to another, the period of his postemployment ineligibility as to matters in a particular area ends 1 year after his responsibility for that area ends. For example, if an individual transfers from a supervisory position in the Internal Revenue Service to a supervisory position in the Post Office Department and leaves that department for private employment 9 months later, he will be free of the restriction of subsection (b) in 3 months insofar as Internal Revenue matters are concerned. He will of course be bound by it for a year in respect of Post Office Department matters.

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[5] These two provisions of section 205 refer to an "officer or employee" and not, as do certain of the other provisions of the Act, to an "officer or employee, including a special Government employee." However, it is plain from the definition in section 202(a) that a special Government employee is embraced within the comprehensive term "officer or employee." There would seem to be little doubt, therefore, that the instance provisions of section 205 apply to special Government employees even in the absence of an explicit reference to them.

[6] The prohibitions of the two subsections apply to persons ending service in these areas whether they leave the Government entirely or move to the legislative or judicial branch. As a practical matter, however, the prohibitions would rarely be significant in the latter situation because officers and employees of the legislative and judicial branches are covered by sections 203 and 205.

The proviso following subsections (a) and (b) authorizes an agency head, notwithstanding anything to the contrary in their provisions, to permit a former officer or employee with outstanding scientific qualifications to act as attorney or agent or appear personally before the agency for another in a matter in a scientific field. This authority may be exercised by the agency head upon a "national interest" certification published in the FEDERAL REGISTER.

Subsections (a) and (b) describe the activities they forbid as being in connection with "particular matter[s] involving a specific party or parties" in which the former officer or employee had participated. The quoted language does not include general rulemaking, the formulation of general policy or standards, or other similar matters. Thus, past participation in or official responsibility for a matter of this kind on behalf of the Government does not disqualify a former employee from representing another person in a proceeding which is governed by the rule or other result of such matter.

Subsection (a) bars permanently a greater variety of actions than subsection (b) bars temporarily. The conduct made unlawful by the former is *any action as agent or attorney*, while that made unlawful by the latter is *a personal appearance as agent or attorney*. However, neither subsection precludes postemployment activities which may fairly be characterized as no more than aiding or assisting another.[8] An individual who has left an agency to accept private employment may, for example, immediately perform technical work in his company's plant in relation to a contract for which he had official responsibility—or, for that matter, in relation to one he helped the agency negotiate. On the other hand, he is *forbidden* for a year, in the first case to appear personally before the agency as the agent or attorney of his company in connection with a dispute over the terms of the contract. And he may at no time appear personally before the agency or otherwise act as agent or attorney for his company in such dispute if he helped negotiate the contract.

Comparing subsection (a) with the antecedent 18 U.S.C. 284 discloses that it follows the latter in limiting disqualification to cases where a *former* officer or employee actually participated in a matter for the Government. However, subsection (a) covers all matters in which the United States is a party or has a direct and substantial interest and not merely the "claims against the United States" covered by 18 U.S.C. 284. Subsection (a) also goes further than the latter in imposing a lifetime instead of a 2-year bar. Subsection (b) has no parallel in 18 U.S.C. 284 or any other provision of the former conflict in interest statutes.

It will be seen that subsections (a) and (b) in combination are less restrictive in some respects, and more restrictive in others, than the combination of the prior 18 U.S.C. 284 and 5 U.S.C. 99. Thus, former officers or employees who were outside the Government when the Act came into force on January 21, 1963, will in certain situations be enabled to carry on activities before the Government which were previously barred. For example the repeal of 5 U.S.C. 99 permits an attorney who left an executive department for private practice a year before to take certain cases against the Government immediately which would be subject to the bar of 5 U.S.C. 99 for another year. On the other hand, former officers or employees became precluded on and after January 21, 1963, from engaging or continuing to engage in certain activities which were permissible until that date. This result follows from the replacement of the 2-year bar of 18 U.S.C. 284 with the lifetime bar of subsection (a) in comparable situations, from the increase in the variety of matters covered by subsection (b) as compared with 18 U.S.C. 284 and from the introduction of the 1-year bar of subsection (b).

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[7] Neither section 203 nor section 205 prevents a special Government employee, during his period of affiliation with the Government, from representing another person before the Government in a particular matter only because it is within his official responsibility. Therefore the inclusion of a *former* special Government employee within the 1-year postemployment ban of subsection (b) may subject him to a temporary restraint from which he was free prior to the end of his Government service. However, since special Government employees usually do not have "official responsibility," as that term is defined in section 202(b), their inclusion within the 1-year ban will not have a widespread effect.

[8] Subsection (a), as it first appeared in H.R. 8140, the bill which became Pub. L. 87-849, made it unlawful for a former officer or employee to act as agent or attorney for, *or aid or assist*, anyone in a matter in which he had participated. The House Judiciary Committee struck the underlined words, and the bill became law without them. It should be noted also that the repealed provisions of 18 U.S.C. 283 made the distinction between one's acting as agent or attorney for another and his aiding or assisting another.

Subsection (c) of section 207 pertains to an individual outside the Government who is in a business or professional partnership with someone serving in the executive branch, an independent agency or the District of Columbia. The subsection prevents such individual from acting as attorney or agent for anyone other than the United States in any matters, including those in court, in which his partner in the Government is participating or has participated or which are the subject of his partner's official responsibility. Although included in a section dealing largely with postemployment activities, this provision is not directed to the postemployment situation.

The paragraph at the end of section 207 also pertains to individuals in a partnership but sets forth no prohibition. This paragraph, which is of importance mainly to lawyers in private practice, rules out the possibility that an individual will be deemed subject to sections 203, 205, 207(a) or 207(b) solely because he has a partner who serves or has served in the Government either as a regular or a special Government employee.

New 18 U.S.C. 208. This section forbids certain actions by an officer or employee of the Government in his role as a servant or representative of the Government. Its thrust is therefore to be distinguished from that of sections 203 and 205 which forbid certain actions in his capacity as a representative of persons outside the Government.

Subsection (a) in substance requires an officer or employee of the executive branch, an independent agency or the District of Columbia, including a special Government employee, to refrain from participating as such in any matter in which, to his knowledge, he, his spouse, minor child or partner has a financial interest. He must also remove himself from a matter in which a business or nonprofit organization with which he is connected or is seeking employment has a financial interest.

Subsection (b) permits the agency of an officer or employee to grant him an ad hoc exemption from subsection (a) if the outside financial interest in a matter is deemed not substantial enough to have an effect on the integrity of his services. Financial interests of this kind may also be made nondisqualifying by a general regulation published in the Federal Register.

Section 208 is similar in purpose to the former 18 U.S.C. 434 but prohibits a greater variety of conduct than the "transaction of business with * * * [a] business entity" to which the prohibition of section 434 was limited. In addition, the provision in section 208 including the interests of a spouse and others is new, as is the provision authorizing exemptions for insignificant interests.

New 18 U.S.C. 209. Subsection (a) prevents an officer or employee of the executive branch, an independent agency or the District of Columbia from receiving, and anyone from paying him, any salary or supplementation of salary from a private source as compensation for his services to the Government. This provision uses much of the language of the former 18 U.S.C. 1914 and does not vary from that statute in substance. The remainder of section 209 is new.

Subsection (b) specifically authorizes an officer or employee covered by subsection (a) to continue his participation in a bona fide pension plan or other employee welfare or benefit plan maintained by a former employer.

Subsection (c) provides that section 209 does not apply to a special Government employee or to anyone serving the Government without compensation, whether or not he is a special Government employee.

Subsection (d) provides that the section does not prohibit the payment or acceptance of contributions, awards or other expenses under the terms of the Government Employees Training Act (72 Stat. 327, 5 U.S.C. 2301-2319).

STATUTORY EXEMPTIONS FROM CONFLICT OF INTEREST LAWS

Congress has in the past enacted statutes exempting persons in certain positions—usually advisory in nature—from the provisions of some or all of the former conflict of interest laws. Section 2 of the Act grants corresponding exemptions from the new laws with respect to legislative and judicial positions carrying such past exemptions. However, section 2 excludes positions in the executive branch, an independent agency and the District of Columbia from this grant. As a consequence, all statutory exemptions for persons serving in those sectors of the Government ended on January 21, 1963.

RETIRED OFFICERS OF THE ARMED FORCES

Public Law 87-849 enacted a new 18 U.S.C. 206 which provides in general that the new sections 203 and 205, replacing 18 U.S.C. 281 and 283, do not apply to retired officers of the armed forces and other uniformed services. However, 18 U.S.C. 281 and 283 contain special restrictions applicable to retired officers of the armed forces which are left in force by the partial repealer of those statutes set forth in section 2 of the Act.

The former 18 U.S.C. 284, which contained a 2-year disqualification against postemployment activities in connection with claims against the United States, applied by its terms to persons who had served as commissioned officers and whose active service had ceased either by reason of retirement or complete separation. Its replacement, the broader 18 U.S.C. 207, also applies to persons in those circumstances. Section 207, therefore applies to retired officers of the armed forces and overlaps the continuing provisions of 18 U.S.C. 281 and 283 applicable to such officers although to a different extent than did 18 U.S.C. 284.

VOIDING TRANSACTIONS IN VIOLATION OF THE CONFLICT OF INTERESTS OR BRIBERY LAWS

Public Law 87-849 enacted a new section, 18 U.S.C. 218, which did not supplant a preexisting section of the criminal code. However, it was modeled on the last sentence of the former 18 U.S.C. 216 authorizing the President to declare a Government contract void which was entered into in violation of that section. It will be recalled that section 216 was one of the two statutes repealed without replacement.

The new 18 U.S.C. 218 grants the President and under presidential regulations, an agency head the power to void and rescind any transaction or matter in relation to which there has been a "final conviction" for a violation of the conflict of interest or bribery laws. The section also authorizes the Government's recovery, in addition to any penalty prescribed by law or in a contract, of the amount expended or thing transferred on behalf of the Government.

Section 218 specifically provides that the powers its grants are "in addition to any other remedies provided by law." Accordingly, it would not seem to override the decision in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), a case in which there was no "final conviction."

BIBLIOGRAPHY

Set forth below are the citations to the legislative history of Public Law 87-849 and a list of recent material which is pertinent to a study of the Act. The listed 1960 report of the Association of the Bar of the City of New York is particularly valuable. For a comprehensive bibliography of earlier material relating to the conflict of interest laws, see 13 Record of the Association of the Bar of the City of New York 323 (May 1958).

Legislative History of Pub. L. 87-849 (H.R. 8140, 87th Cong.)

1. Hearings of June 1 and 2, 1961, before the Antitrust Subcommittee (Subcommittee No. 5) of the House Judiciary Committee, 87th Cong., 1st sess., ser. 3, on *Federal Conflict of Interest Legislation.*
2. H. Rept. 748, 87th Cong., 1st sess.
3. 107 Cong. Rec. 14774.
4. Hearing of June 21, 1962, before the Senate Judiciary Committee, 87th Cong., 2d sess., on *Conflict of Interest.*
5. S. Rept. 2213, 87th Cong., 2d sess.
6. 108 Cong. Rec. 20805 and 21130 (daily ed., October 3 and 4, 1962).

Other Material

1. President's special message to Congress, April 27, 1961, and attached draft bill, 107 Cong. Rec. 6835.
2. President's Memorandum of February 9, 1962, to the heads of executive departments and agencies entitled *Preventing Conflicts of Interest on the Part of Advisers and Consultants to the Government,* 27 FR 1341.
3. 42 Op. A.G. No. 6, January 31, 1962.
4. Memorandum of December 10, 1956, for the Attorney General from the Office of Legal Counsel re conflict of interest statutes, Hearings before the Antitrust Subcommittee (Subcommittee No. 5) of House Judiciary Committee, 86th Cong., 2d sess., ser. 17, pt. 2, p. 619.
5. Staff report of Antitrust Subcommittee (Subcommittee No. 5) of House Judiciary Committee, 85th Cong., 2d sess., *Federal Conflict of Interest Legislation* (Comm. Print 1958).
6. Report of the Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* (Harvard Univ. Press 1960).

[28 FR 965, Feb. 1, 1963]

PART 47—RIGHT TO FINANCIAL PRIVACY ACT

Sec.
47.1 Definitions.
47.2 Purpose.
47.3 Authorization.
47.4 Written request.
47.5 Certification.

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; section 1108 of the Right to Financial Privacy Act of 1978, 12 U.S.C. 3408.

Source: Order No. 822-79, 44 FR 14554, Mar. 13, 1979, unless otherwise noted.